

sued state officials for deficiencies in their services and sought a total of twelve injunctions, not all of which were directly applicable to the class as a whole.³⁹ Despite the multitude of injunctions, the district court certified the class on the grounds that the relief was intended to remedy a systemic failure applicable to the class as a whole and that the injunctions would benefit all class members by generally improving the State’s foster care system.⁴⁰ Referring to the plaintiff’s action as a “super-claim,” however, the Fifth Circuit reversed on the ground that the class’s desired remedy included at least some claims for individualized injunctive relief, regardless of any aggregate benefit to the class as a whole.⁴¹ Unlike the reasoning originally employed by the district court in *Perry*, the single injunction requirement as applied by the Fifth Circuit focuses on indivisibility with respect to the form of the injunction as opposed to the indivisible nature of the defendant’s conduct and the resulting injury.

It is not clear that the single injunction requirement applied as such reflects a proper understanding of Rule 23(b)(2)’s remedial scope. By its terms, the rule permits certification where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”⁴² While the rule’s language makes no reference to a permissible quantity of injunctions, speaking instead in the broader language of “injunctive relief,” it explicitly mentions the general applicability of the defendant’s conduct relative to the class members. At least on first pass, that framing suggests that the cornerstone of the inquiry ought to be whether the injury and

³⁹ 675 F.3d 832 (5th Cir. 2012).

⁴⁰ *Id.* at 847.

⁴¹ *Id.* at 846–47. On remand, the district court, upon request of the plaintiffs, assessed the certifiability of a general class and four subclasses, between which the various injunctions originally sought were divided. Although plaintiff’s motion for certification was not granted in full, the court found that the general subclass and the four subclasses satisfied Rule 23(b)(2) with respect to the particular injunctions sought by each. *M.D. v. Perry*, 294 F.R.D. 7 (S.D. Tex. 2013), *appeal dismissed as untimely*, 547 Fed. Appx. 543 (5th Cir. 2013). For further discussion of the use of subclassing to mitigate the burdens of the single injunction requirement, see *infra* notes 44–46 and accompanying text.

⁴² FED. R. CIV. P. 23(b)(2).

conduct targeted by the injunction or injunctions and the resulting benefits are applicable to the class as a whole.

The Advisory Committee’s comments on the intended scope of Rule 23(b)(2) further suggest that it is a mistake to focus so heavily on the singularity of the injunction sought. Those comments begin with a rather clear statement: “This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.”⁴³ Based on that language, the focus again appears to be on the defendant’s conduct rather than the nature of the injunction itself. Moreover, the fact that the committee specifically cautioned against the use of Rule 23(b)(2) where “the appropriate final relief relates exclusively or predominantly to money damages” without making any such warning against classes seeking more than one injunction indicates that multi-injunction (b)(2) classes were not chief amongst their concerns at the time of drafting.⁴⁴ Thus, the district court in *Perry* may well have had the better view when it originally certified the class on the ground that the class members were “comparably subject to the injuries caused by [the] systemic failure[s]” and held that the mere fact that “certain forms of relief . . . would certainly not apply to all class members” was not “fatal to Rule 23(b)(2) certification.”⁴⁵

But, in any event, the single injunction requirement is here to stay, and it undoubtedly complicates (b)(2) certification in some contexts. As a practical matter, the extent to which it does so depends in large part upon the availability of subclassing. Under Rule 23(c)(5), courts have the authority, “[w]hen appropriate,” to divide a class “into subclasses that are each treated as a class

⁴³ *Committee Note*, 39 F.R.D. at 102.

⁴⁴ *Id.*

⁴⁵ *M.D. v. Perry*, No. C-11-84, 2011 WL 2173673, at *13–16 (S.D. Tex. June 2, 2011), *vacated and remanded sub nom. M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012).

under this rule.”⁴⁶ Because each subclass is treated as its own class for procedural purposes, indivisibility should only require that each subclass be remedied by a single injunction. It follows that by splitting members into subclasses based upon the nature of the injunctive relief required to provide that subset with a final remedy, courts could permit a series of comprehensive subclass-wide injunctions without running into issues with *Dukes*’ single injunction standard.⁴⁷

Like bifurcation, however, subclassing is not a perfect solution. Most notably, subclassing becomes far more complicated when the class members cannot be easily divided by their corresponding remedial needs. As a result, the single injunction requirement will likely remain a barrier to certification for larger, more complex class actions in which no amount of feasible subclassing can eliminate the need for individualized relief.⁴⁸ And, as with bifurcation, discretionary procedures like subclassing are only useful insofar as the courts are willing to permit them. Thus, while strategic subclassing may help to soften the impact of the single injunction requirement even in circuits where it is stringently applied, the inherent limitations of that approach make it an unlikely candidate for mitigating the requirement’s larger burdens.

B. Nonfinal Injunctions

Even when a class seeks a single injunction, *Dukes* may still prevent certification if subsequent individualized determinations are an explicit or natural consequence of the injunction. Take, for example, the Seventh Circuit’s decision in *Jamie S. v. Milwaukee Public Schools*.⁴⁹ There, the court reversed certification of a class seeking broad injunctive relief for violations of the Individuals with Disabilities Education Act.⁵⁰ Unlike in *Perry*, the putative class sought a

⁴⁶ FED. R. CIV. P. 23(c)(5).

⁴⁷ See, e.g., *M.D. v. Perry*, 294 F.R.D. 7 (S.D. Tex. 2013) (certifying a general class and four subclasses on remand after reversal for failure to satisfy the single injunction requirement).

⁴⁸ Cf. *Valentine v. Collier*, No. 4:20 Civ. 1115, 2020 WL 5797881, at *25 (S.D. Tex. Sept. 29, 2020) (noting that some but not all of the subclasses were structured such that a single injunction could afford an adequate remedy).

⁴⁹ 668 F.3d 481 (7th Cir. 2012).

⁵⁰ *Id.*

single injunction, which in turn would have begun a process of individualized determinations in order to effectuate the ultimate relief desired.⁵¹ Rejecting that injunction, which it referred to as “class-wide in name only,” the court held that Rule 23(b)(2) permitted certification only when a single injunction, “on its own,” provides *final* relief to the class as a whole.⁵² Recently, this bar on what one might call nonfinal injunctions has prevented certification of a class seeking the immediate release of ICE detainees who are at heightened risk of death or severe illness from COVID-19⁵³ and a class seeking to remedy purportedly unconstitutional detentions.⁵⁴

Though potentially disruptive, the requirement that the injunction provide a final remedy is not always a significant bar for (b)(2) certification if the request for relief is properly structured. Indeed, some courts appear to have been less stringent on this front than others, particularly when the follow-on procedures resulting from the injunctive scheme are to be performed by some non-judicial entity. In *Scholl v. Mnuchin*, for example, a putative (b)(2) class challenged the IRS’s “generally applicable policy of denying [stimulus] payments to incarcerated persons on the basis of their status.”⁵⁵ Although, “as a consequence of the injunctive relief, incidental monetary relief could flow to the class if [the IRS] re-determine[d] the class's eligibility for . . . benefits under the correct legal standard,” the court certified the (b)(2) class, which sought to enjoin enforcement of

⁵¹ *Id.* at 499.

⁵² *Id.* at 498–99. On remand with instructions to “address the *individual* claims of the named plaintiffs,” the district court granted the defendants judgment on the pleadings on the ground that the exception to the exhaustion of remedies requirement typically employed in class actions no longer justified the plaintiffs’ failure to exhaust their administrative remedies. *Jamie S. v. Milwaukee Bd. of Sch. Dirs.*, No 01 Civ. 928, 2012 WL 3600231, at *4 (E.D. Wis. Aug. 20, 2012).

⁵³ *See* *Juarez v. Asher*, No. 20 Civ. 0700 (JLR) (MLP), 2020 WL 5746875, at *4 (W.D. Wash. Sept. 25, 2020) (denying certification under (b)(2) on the ground that, “because not all class members may be eligible for immediate release, the court cannot conclude that Petitioners seek an indivisible remedy”).

⁵⁴ *See* *Onosamba-Ohindo v. Barr*, No. 20 Civ. 00290 (EAW), 2020 WL 5226495, at *19 (W.D.N.Y. Sept. 2, 2020) (denying certification of a class seeking constitutionally sufficient bond hearings on the ground that the subset of the class who had been previously provided with such hearings (albeit with deficient procedures) could not receive the requested relief absent “an individualized determination by a court as to whether they are entitled to another one”).

⁵⁵ No. 20 Civ. 05309 (PJH), 2020 WL 5702129, at *24–25 (N.D. Cal. Sept. 24, 2020).

that non-payment policy.⁵⁶ In explaining its decision, the court found it “significant that plaintiffs request[ed] an injunction relating to a generally applicable policy, [while] any individual determination of monetary relief [was] left to the IRS, not the court,” and resolving the case itself would not “involve individual determinations regarding monetary damages.”⁵⁷ Though concerned principally with follow-on procedures that may result in individualized monetary relief, *Scholl*’s reasoning applies with equal force to injunctions that would kick-start an individualized process of determining entitlement to non-monetary relief.

Scholl and other cases also suggest that there is significant play in the joints where the process initiated by the injunction is itself the relief desired by the plaintiffs, as opposed to a means of obtaining that relief.⁵⁸ Thus, in *Gomez v. Trump*, the court had no trouble certifying a (b)(2) class seeking “an injunction that prevents the State Department from implementing [a] No-Visa Policy and the COVID-19 Guidance against [Diversity Visa Lottery] Selectees” and would provide them with “the *opportunity* to have their diversity visa applications processed and adjudicated consistent with governing statutes and regulations after the end of the 2020 fiscal year.”⁵⁹ Although each class member undoubtedly hoped to obtain a visa, which would depend upon an individualized determination, that end was not itself the relief sought by the class. Rather, the alleged violation and consequent remedy concerned only the opportunity to have that

⁵⁶ *Id.* at 24.

⁵⁷ *Id.* at 25 (citing *Wit v. United Behavioral Health*, 317 F.R.D. 106, 133 (N.D. Cal. 2016) (“What is of particular significance is that even if Plaintiffs prevail on their request for an injunction requiring that all claims decided under the allegedly faulty Guidelines be reprocessed, the Court will not be required to address individualized claims for damages.”)).

⁵⁸ Compare *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010) (certifying a (b)(2) class seeking a bond hearing to determine whether release was an available remedy, as opposed to immediate release itself, even though some class members may ultimately not be entitled to release), and *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014) (certifying class of prisoners seeking an injunction that would require the defendants to implement a plan to eliminate the risk caused by the defendants’ various medical and other policies), with *Juarez v. Asher*, 2020 WL 5746875, at *4 (W.D. Wash. Sept. 25, 2020) (denying certification of putative (b)(2) class seeking immediate release in light of COVID-19 where not all class members would necessarily be eligible for immediate release).

⁵⁹ No. 20 Civ. 01419 (APM), 2020 WL 5861101, at *10 (D.D.C. Sept. 30, 2020), *appeal dismissed per stipulation*, No. 20-5332, 2020 WL 7688214 (D.C. Cir. Dec. 14, 2020).

determination made. And because “[n]o class member ask[ed] the court to actually issue a visa[,] [t]he requested injunctive relief . . . applie[d] uniformly across the class.”⁶⁰ Thus, while the bar on follow-on procedures undoubtedly poses hurdles to certification in some contexts, the effects of that requirement appear less likely to alter the landscape of injunctive class actions on a broader scale relative to the other developments described herein.

C. Nonmutual Benefit

Finally, the limitations imposed by the single injunction requirement may arise when, as is often the case in protracted class litigation,⁶¹ some portion of the plaintiffs will no longer be entitled to recover (or will no longer benefit from that recovery) when all is said and done. In such circumstances, *Dukes*’ command that a single injunction must “provide relief to each member of the class”⁶² would seemingly bar certification, at least if applied rigidly. Unlike the prior two issues, the conceivable problem is not one of seeking multiple injunctions or non-final relief but instead an inability to meaningfully benefit each class member via a single injunction that provides for final relief.

The full implication of *Dukes* in this context has yet to be fully realized in the courts. The Ninth Circuit, for example, had long held that “[e]ven if some class members have not been injured by the challenged practice” and thus would not be entitled to any specific recovery, “a class may nevertheless be appropriate.”⁶³ *Dukes* notwithstanding, courts in the Ninth Circuit and elsewhere have continued to apply that standard.⁶⁴ And, in *Amara v. Cigna Corp.*, the Second Circuit explicitly rebuffed the notion that (b)(2) certification was improper where some portion of the class

⁶⁰ *Id.*

⁶¹ See *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 808 (7th Cir. 2013) (“It is often the case in class litigation that by the time the remedial phase is reached, some of the original plaintiffs will not be entitled to recover . . .”).

⁶² 564 U.S. at 360.

⁶³ *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir.1998).

⁶⁴ See, e.g., *Scholl v. Mnuchin*, No. 20 Civ. 05309 (PJH), 2020 WL 5702129, at *25–26 (N.D. Cal. Sept. 24, 2020); *Gooch v. Life Invs. Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012).

would not ultimately recover: “[*Dukes*] did not make all such class actions impermissible. Instead, the decision simply emphasized that in a class action certified under Rule 23(b)(2), each individual class member is not entitled to a *different* injunction.”⁶⁵ Those cases at least initially suggested that the single injunction requirement primarily regulated the general structure of the relief sought and not the actual benefit that the relief had on each individual class member. But while the Second Circuit has not repudiated *Amara*, that court’s recent decision in *Berni v. Barilla S.p.A.*⁶⁶ may well signal a departure from *Amara*’s reasoning about the effect of the single injunction requirement in this context.

In *Berni*, the Second Circuit assessed the certification of a (b)(2) settlement class comprised of consumers who were allegedly deceived by the misleading empty space—“slack fill”—in some of Barilla’s pasta boxes.⁶⁷ The relief provided by the settlement was straightforward: Barilla would include a fill-line and disclaimer language on its boxes. In this respect, there appeared to be no indivisibility issue with the relief sought, which was authorized by a single injunction applicable to the consumer class as a whole without individualized follow-on processes. But after the district court rejected an objecting class member’s challenge to the structure of the relief, the Second Circuit reversed certification. Because the vast majority of class members were now aware of the volume of pasta in the boxes, the court reasoned, any changes to the packaging would not provide them with information that they did not already have, even if the court were to assume that they would choose to purchase that same product again.⁶⁸ Consequently, the court held that “because

⁶⁵ 775 F.3d 510, 522 (2d Cir. 2014) (internal quotation marks omitted).

⁶⁶ 964 F.3d 141 (2d Cir. 2020).

⁶⁷ *Id.* at 144.

⁶⁸ *Id.* at 147–48.

not every member of that group [stood] to benefit from the ‘fill-line’ and disclaimer language included in the settlement proposal[,] that group [could not] be certified as a Rule 23(b)(2) class.”⁶⁹

One thing is evident following *Berni*: putative past purchaser-classes seeking injunctive relief for prior injuries are not certifiable under Rule 23(b)(2), at least in the Second Circuit. The decision’s broader effect, however, remains somewhat uncertain, as it is ultimately unclear whether *Berni* turns primarily on standing grounds or instead on indivisibility and the single injunction requirement. The way in which future courts resolve that ambiguity will largely determine the effect of *Berni* in the Second Circuit as well as the likelihood that courts elsewhere adopt its reasoning.

In assessing the underlying legal basis for the disposition in *Berni*, it is important to note that the reasoning ultimately adopted therein was not novel. Rather, it had been raised in prior cases with varying degrees of success. Within the Second Circuit, for example, some district courts had reached the conclusion arrived at in *Berni*,⁷⁰ while others had maintained the existence of a carve-out in these contexts in order to avoid “remov[ing] . . . important consumer protection tools.”⁷¹ Amongst those decisions, most were grounded far more concretely in a standing analysis

⁶⁹ *Id.* at 149.

⁷⁰ See *Davis v. Hain Celestial Grp., Inc.*, 297 F. Supp. 3d 327, 338 (E.D.N.Y. 2018); *Langan v. Johnson & Johnson Consumer Cos.*, No. 13 Civ. 1471 (JAM), 2017 WL 985640 at *11 (D. Conn. Mar. 13, 2017); *Singleton v. Fifth Generation, Inc.*, No. 15 Civ. 474 (BKS) (TWD), 2017 WL 5001444 at *16 (N.D.N.Y. Sept. 27, 2017); *In re Avon Anti-Aging Skincare Creams and Prods. Mktg. & Sales Prac. Litig.*, No. 13 Civ. 150 (JPO), 2015 WL 5730022, at *8 (S.D.N.Y. Sept. 30, 2015); *Vaccariello v. XM Satellite Radio, Inc.*, 295 F.R.D. 62, 68 (S.D.N.Y. 2013).

⁷¹ *In re Amla Litig.*, 282 F. Supp. 3d 751, 770 (S.D.N.Y. 2017). See also *Ackerman v. Coca-Cola Co.*, No. 9 Civ. 395 (DLI) (RML), 2013 WL 7044866, at *15 n.23 (“[C]ourts have consistently held that plaintiffs have standing to seek injunctive relief based on the allegation that a product’s labeling or marketing is misleading to a reasonable consumer. To hold otherwise would effectively bar any consumer who avoids the offending product from seeking injunctive relief. (internal quotation marks omitted)); *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29, 67 (E.D.N.Y. 2015) (“To hold that plaintiff lacks Article III standing would denigrate the New York consumer protection statute, designed as a major support of consumers who claim to have been cheated. The only way a consumer could enjoin deceptive conduct would be if he were made aware of the situation by suffering injury. But once the consumer learned of the deception, he would voluntarily abstain from buying and therefore could no longer seek an injunction.”).

than was *Berni*. A similar reliance on standing, rather than indivisibility, appears in other circuit court decisions addressing similar challenges.⁷²

The court's language in *Berni*, however, is far less moored to the sort of analysis involved in a standing inquiry. To be clear, the court does reference a number of standing cases that concern the availability of prospective relief, including *City of Los Angeles v. Lyons*.⁷³ And the court also reasons that "[w]here there is no likelihood of future harm, there is no standing to seek an injunction, and so no possibility of being certified as a Rule 23(b)(2) class."⁷⁴ But other aspects of the decision suggest that the case is best read to have turned on a construction of Rule 23(b)(2) resulting from the intersection of *Dukes*' language about indivisibility and *Lyons*' reasoning about when parties stand to benefit from prospective relief premised on past injuries.

Most notably, despite its early discussion of standing cases, the court consistently framed its holding as a matter of certifiability in the context of non-mutual benefits. Thus, while the court could have concluded that "[b]ecause [class members] lack Article III standing to seek injunctive relief, the District Court was obliged to deny class certification under Rule 23(b)(2)," ⁷⁵ it instead held that "because not every member of [the class] stood to benefit from" the injunction sought, "that group cannot be certified as a Rule 23(b)(2) class."⁷⁶ The court's treatment of *Dukes* mirrors this focus. After noting *Dukes*' determination that a single injunction must afford relief "to each member of the class," the court wrote: "Put another way, a class may *not* be certified under Rule

⁷² See, e.g., *Davidson v. Kimberly-Clark Corporation*, 889 F.3d 956 (9th Cir. 2018) (finding sufficient standing for a class of past purchasers because the named plaintiff adequately alleged likelihood of future injury); *McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 225-26 (3d Cir. 2012) (finding lack of standing for consumer class action not because injunctive relief for a class past purchasers was categorically unavailable, but because the lead plaintiff failed to establish a likelihood of future injury).

⁷³ *Berni*, 964 F.3d at 147 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)).

⁷⁴ *Id.* at 149.

⁷⁵ *McNair*, 672 F.3d at 227.

⁷⁶ *Berni*, 964 F.3d at 149.

23(b)(2) if any class member's injury is not remediable by the injunctive or declaratory relief sought."⁷⁷ From those statements, it seems clear that the court was principally engaged in an application of *Dukes*' indivisibility and single injunction requirements, not a standing inquiry. In other words, while *Berni* relies on the *reasoning* of standing cases involving prospective injunctive relief for past injuries, it does so merely to demonstrate why injunctive relief would not have benefited each of the class members and, in turn, to determine that the relief sought was not indivisible. That conclusion ultimately speaks to Rule 23(b)(2), not Article III.

Whether that understanding of *Berni* is widely adopted by courts within the Second Circuit and elsewhere remains to be seen. Recently, a number of district court decisions have referenced *Berni* when finding that plaintiffs lacked standing to seek injunctive relief for claims premised on prior purchases. The majority of those cases, however, can be distinguished by the fact that they were either resolved on motions to dismiss made before the class sought certification⁷⁸ or were not class actions,⁷⁹ meaning that there was no occasion to consider indivisibility or Rule 23(b)(2) more generally.⁸⁰ Meanwhile, one of the few courts that has addressed *Berni* in the class certification

⁷⁷ *Id.* at 146.

⁷⁸ See *Patellos v. Hello Products, LLC*, No. 19 Civ. 9577 (PAE), 2021 WL 827769, at *10–11 (S.D.N.Y. Mar. 4, 2021); *Budhani v. Monster Energy Co.*, No. 20 Civ. 1409 (LJL), 2021 WL 1104988, at *13–14 (S.D.N.Y. Mar. 22, 2021); *Kennedy v. Mondelez Glob. LLC*, No. 19-CV-302 (ENV) (SJB), 2020 WL 4006197, at *4–5 (E.D.N.Y. July 10, 2020).

⁷⁹ See *Rivera v. Navient Solutions, LLC*, No. 20-cv-1284 (LJL), 2020 WL 4895698 (S.D.N.Y. Aug 19, 2020).

⁸⁰ But cf. *Grossman v. Simply Nourish Pet Food Co.*, No. 20-CV-1603 (KAM) (ST), 2021 WL 293774, at *5 n.5 (E.D.N.Y. Jan. 27, 2021) (suggesting both that *Berni* applies with equal force under Rule 12 and Rule 23 and also that the court's decision in *Berni* "broadly addressed the district court's authority to provide injunctive relief in equity and relied on constitutional requirements for standing that all plaintiffs must satisfy"); *Campbell v. Whole Foods Mkt. Grp., Inc.*, No. 1:20-CV-01291-GHW, 2021 WL 355405, at *16 (S.D.N.Y. Feb. 2, 2021) (characterizing *Berni* as turning on standing, rejecting an attempt to confine *Berni* to the class certification context on the ground that "the reasoning behind the Circuit's decision in *Berni* applies equally" to Rule 12 motions to dismiss, and applying *Berni* to find a lack of standing).

context to date appeared to frame its treatment of the case as speaking directly to that issue, rather than as a matter of standing.⁸¹

In any event, the consequence of framing *Berni* as turning on indivisibility is perhaps most apparent when considering the decision’s potential weight in other circuits. Unlike the Second and Eighth Circuits, the majority of courts to have addressed the issue take the view that “as long as one member of a class has a plausible claim to [injury], the requirement of standing is satisfied” in a (b)(2) action.⁸² In those circuits, the *Berni* court’s framing of its inquiry—“Has an actual and imminent threat of future injury been shown by all members of the class here”⁸³—demands far more than a standing inquiry likely would and consequently threatens decertification where the standing requirements would not. Thus, while a majority of circuits would not receive *Berni*’s favorably if viewed as a matter of standing, it’s logic may still produce similar outcomes in those circuits if, as suggested above, it can be framed as a matter of indivisibility.

Moreover, other circuit cases demonstrate that the standing approach to this issue may be more permissive than *Berni*’s rule in the sense that it provides some pathway to certification for past-purchaser classes so long as they can adequately allege future harm. In *Davidson v. Kimberly-Clark Corporation*, for example, the court made clear that they were unwilling to say “injunctive relief is never available” in this context because it would be at least possible that the standing requirements could still be satisfied by a class of past purchasers who can demonstrate a threat of future harm.⁸⁴ So too in *McNair v. Synapse Group Inc.*, where the court found standing lacking

⁸¹ *In re Kind LLC “Healthy & All Natural” Litig.*, No. 15mc2645, 2021 WL 1132147, at *19–20 (S.D.N.Y. Mar. 24, 2021) (holding, without reference to standing, that because the putative class of past purchasers at bar was analogous to that in *Berni*, “an injunctive class cannot be sustained”).

⁸² Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 HARV. J.L. & PUB. POL’Y 769, 821–22 (2016); *see also* *Andren v. Alere, Inc.*, No. 16 Civ. 1255 (GPC) (AGS), 2017 WL 6509550, at *20 (S.D. Cal. Dec. 20, 2017) (“The Ninth Circuit has held that in a class action, Article III standing is satisfied if at least one named plaintiff meets the requirements.”).

⁸³ 964 F.3d at 147.

⁸⁴ 889 F.3d 956 (9th Cir. 2018).

not because injunctive relief for a class of past purchasers was categorically unavailable but because the lead plaintiff failed to establish a likelihood of future injury.⁸⁵

As framed by the Second Circuit, however, *Berni*'s rule appears to be stricter than that of *Davidson* and *McNair* both in its absolute foreclosure of certification for past purchaser classes based on a categorical determination about an inability to show risk of future harm as well as in its related unwillingness to give any weight to the risk of future harm asserted by those specific plaintiffs.⁸⁶ And, equally importantly, it does so within the context of low-value consumer injuries that, absent prosecution via an injunctive class action, will likely go entirely unremedied.⁸⁷ As such, a proliferation of *Berni*'s rule or reasoning to a broader set of putative classes would considerably undermine the utility of Rule 23(b)(2) in addressing past corporate and governmental wrongdoing that results in widespread injuries.⁸⁸

CONCLUSION

The developments catalogued above are nothing more than that—developments. They are neither representative of the overwhelming state of the law nor even the majority position on every

⁸⁵ 672 F.3d 213, 225-26 (3d Cir. 2012).

⁸⁶ *Berni*, 964 F.3d at 147–48 (“No matter how ubiquitous Barilla pasta may be, there is no reason to believe that all, or even most, of the class members—having suffered the harm alleged—will choose to buy it in the future.”).

⁸⁷ See *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29, 67 (E.D.N.Y. 2015). That outcome, it would seem, is contrary to the proposition that class actions ought to provide a procedural “device so that mere numbers would not disable large groups of individuals who were united in interest from enforcing their rights or make it possible for others to immunize themselves from liability for their wrongs.” 7A CHARLES ALAN WRIGHT, ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1751 (3d ed., updated Oct. 2020).

⁸⁸ It is not yet clear how courts will address *Berni* outside of the typical consumer class context. The only two cases that shed some light on the issue, as of now, both arise in the related area of student lending. In one, the court dismissed for lack of standing a non-class claim pertaining to late fees allegedly incurred as a result of the servicer's affirmative misrepresentations on the ground that the plaintiff no longer had loans serviced by the company and that, in any event, he would no longer be misled by any of the same language. *Rivera v. Navient Solutions, LLC*, No. 20-cv-1284 (LJL), 2020 WL 4895698, at *14 (S.D.N.Y. Aug. 19, 2020). In the other, the court certified a Rule 23(b)(2) settlement class of public servants who were allegedly misled by their servicer in a manner that significantly delayed their ability to receive public service loan forgiveness, notwithstanding similar objections about *Berni*'s implications for the class. *Hyland v. Navient Corp.*, No. 1:18-cv-9031-DLC, 2020 WL 6554826, at *1 (S.D.N.Y. Oct. 9, 2020), *appeal filed* No. 20-3766 (2d Cir. Nov. 4, 2020). The *Hyland* court appears to have distinguished *Berni* based on the complexity of the alleged misinformation in *Hyland* as well as the more prolonged and involuntary nature of the relationship between borrower and servicer. See Letter for Plaintiffs, *id.* (No. 1:18-cv-9031-DLC), ECF No. 111; Transcript of Final Approval Hearing at 8–9, 49, *id.* (No. 1:18-cv-9031-DLC), ECF No. 183.

issue. But they are significant precisely because they suggest the direction in which courts may go on these critical issues. As this paper has attempted to demonstrate, those trends are concerning for all who place value in the utility of injunctive class actions as a “usable vehicle” for seeking broad relief from a variety of social and structural problems,⁸⁹ as they are poised to further narrow the range of claims that may be aggregated thereunder. Those concerns are only compounded by the fact that the procedural mechanisms currently available appear ill suited for the task of ensuring that the device remains available where it is needed the most. The question moving forward for putative injunctive classes, then, may well be what steps they can take to prevent the proliferation of these trends so as to avoid a narrowing of Rule 23 (b)(2)’s utility on a much broader scale.

⁸⁹ Issacharoff, *supra* note 2, at 109.

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Contact Phone Number	2488853474

Applicant Education

BA/BS From	University of Michigan-Ann Arbor
Date of BA/BS	December 2015
JD/LLB From	Notre Dame Law School
	http://law.nd.edu
Date of JD/LLB	May 9, 2022
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Journal of Legislation
Moot Court Experience	No

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Tidmarsh, Jay
jtidmars@nd.edu
574-631-6985

Alford, Roger
ralford@nd.edu
(574) 631-3771

Bellia, Anthony
Anthony.J.Bellia.3@nd.edu
574-631-9353

This applicant has certified that all data entered in this profile and any application documents are true and correct.

1145 N. Eddy Street, A2039
South Bend, IN 46617
Jbutler8@nd.edu
248-885-3474

March 29, 2022

The Honorable Lewis J. Liman
United States District Court for the Southern District of New York
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, NY 10007

Dear Judge Liman:

I am a third-year student at Notre Dame Law School. I am writing to apply for a clerkship in your chambers beginning in 2023.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. You will receive letters of recommendation from the following people. In the meantime, they would be welcome to discuss my candidacy with you.

Prof. A.J. Bellia
Notre Dame Law School
abellia@nd.edu
(574) 631-4197

Prof. Jay Tidmarsh
Notre Dame Law School
jay.h.tidmarsh.1@nd.edu
(574) 631-8612

Prof. Roger Alford
Notre Dame Law School
ralford@nd.edu
(574) 631-4197

If I can provide additional information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Jeffrey Butler

Jeffrey A. Butler

(248) 885-3474 • jbutler8@nd.edu
1145 N. Eddy St., Apt. 2039, South Bend, IN 46617

EDUCATION

University of Notre Dame Law School

Notre Dame, IN

Juris Doctor Candidate

May 2022

GPA: 3.67

Honors: Staff Editor & Alumni Engagement Chair, *Notre Dame Journal of Legislation*; Honor Roll (Fall 2019 & 2020 & Spring & Fall 2021); Faculty Award for Excellence, Global Antitrust (Spring 2020; recognized at discretion of the professor for most outstanding student performance); Semi-Finalist, Notre Dame Baseball Arbitration Tournament

Activities: Class Host, Notre Dame Law School Admissions; GALILEE Public Interest Immersion Program (Chicago)

University of Michigan

Ann Arbor, MI

Bachelor of Arts in History and Political Science

December 2015

GPA: 3.02

Activities: Philanthropy Chair and Chief Justice of the Judicial Review Board, Chi Psi Fraternity

EXPERIENCE

Baker McKenzie LLP

Chicago, IL

Summer Associate

May 2021 – Present

Notre Dame Law School Intellectual Property and Entrepreneurship Clinic

South Bend, IN

Extern

Feb 2021 – May 2021

- Counseled start-up businesses on whether their names and logos could be trademarked
- Filed trademark applications for clients and conducted trademark searches on the USPTO's Trademark Electronic Search System

United States District Court for the Northern District of Indiana

South Bend, IN

Judicial Extern for the Honorable Damon R. Leichty

June 2020 – July 2020

- Drafted research memoranda and orders
- Researched prior decisions by Judge Leichty and compiled sentencing data about average length given for different offense levels
- Attended pre-trial conferences, evidentiary hearings and sentencing hearings

Pivotal Software Inc.

Chicago, IL

Team Lead, Chicago Inside Sales

February 2017 – July 2019

- Promoted to pilot in-person leadership role for the Chicago Inside Sales team, and managed three sales representatives
- Coached team to meet sales objectives, and met with each team member individually to ensure optimal performance
- Represented the team to the Central Area Field Sales leadership including the Vice President of Sales

Inside Sales Representative

September 2017 – July 2019

- Achieved 100% of quota over seven quarters
- Engaged C-Level executives at Fortune 500 companies to market Pivotal's services by presenting the ways Pivotal could help them increase efficiency and save capital
- Created marketing campaigns to increase awareness of Pivotal's products in the Midwest
- Organized Pivotal events for employees of major Midwest Fortune 500 companies to create sales pipelines

Oracle Corporation

Austin, TX

Business Development Representative

June 2016 – August 2017

- Achieved 103% of yearly quota; finished number one on the team with more than \$2M in sales pipeline
- Identified new business in three major mid-market field territories across the United States and Canada
- Analyzed client needs for Oracle Marketing Cloud technology to increase revenue and customer engagement
- Served as the Business Development Representative on the Advisory Board reporting to the VP of Sales

UNIVERSITY OF NOTRE DAME

NOTRE DAME, INDIANA 46556

Butler, Jeffrey A.
Student ID: XXXXX9860

Date Issued: 21-MAR-2022
Page: 1

Birth Date: 04-07-XXXX

Issued To: Jeffrey Butler
Parchment DocumentID: 38242984
jbutler8@nd.edu

Course Level: Law
Program: Juris Doctor
College: Law School
Major: Law

					UND SEMESTER TOTALS				OVERALL TOTALS				
CRSE	ID	COURSE TITLE	CRS HRS	GRD	QPTS	ATTEMP HRS	EARNED HRS	GPA HRS	GPA	ATTEMP HRS	EARNED HRS	GPA HRS	GPA
UNIVERSITY OF NOTRE DAME CREDIT:													
Fall Semester 2019													
Law School													
LAW	60105	Contracts	4.000	B+	13.332								
LAW	60308	Civil Procedure	4.000	A	16.000								
LAW	60703	Legal Research	1.000	A-	3.667								
LAW	60705	Legal Writing I	2.000	B+	6.666								
LAW	60901	Torts	4.000	A	16.000								
-		Total			55.665	15.000	15.000	15.000	3.711	15.000	15.000	15.000	3.711
Honor Roll													

Spring Semester 2020

During the Spring 2020 semester, a global health emergency required significant changes to coursework. Unusual enrollment patterns and grades reflect the tumult of the time.

Law School												
LAW 60302	Criminal Law	4.000	P	0.000								
LAW 60307	Constitutional Law	4.000	P	0.000								
LAW 60707	Legal Resrch & Writing II-MC	1.000	B+	3.333								
LAW 60906	Property	4.000	P	0.000								
LAW 70118	Global Antitrust	3.000	P	0.000								
LAW 75700	Galilee	1.000	S	0.000								
-	Total			3.333	17.000	17.000	1.000	3.333	32.000	32.000	16.000	3.687

CONTINUED ON PAGE 2

UNIVERSITY OF NOTRE DAME

NOTRE DAME, INDIANA 46556

Butler, Jeffrey A.
Student ID: XXXXX9860

Date Issued: 21-MAR-2022
Page: 2

Birth Date: 04-07-XXXX

CRSE	ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS				OVERALL TOTALS			
						ATTEMP HRS	EARNED HRS	GPA HRS	GPA	ATTEMP HRS	EARNED HRS	GPA HRS	GPA
University of Notre Dame Information continued:													
Fall Semester 2020													
Law School													
LAW	70109	Trade Secrets/Unfair Practices	3.000	A-	11.001								
LAW	70311	Federal Courts	3.000	A-	11.001								
LAW	70435	International Arbitration	3.000	B+	9.999								
LAW	70912	Products Liability	2.000	A	8.000								
LAW	73717	Transnational Civil Litigation	3.000	A-	11.001								
LAW	75753	Journal of Legislation	1.000	S	0.000								
		Total			51.002	15.000	15.000	14.000	3.643	47.000	47.000	30.000	3.667
Honor Roll													
Spring Semester 2021													
Law School													
LAW	70137	Trademark & Unfair Comp	3.000	A-	11.001								
LAW	70211	Adv Leg Res: Federal	2.000	A-	7.334								
LAW	70807	Professional Responsibility	3.000	A-	11.001								
LAW	70812	Jurisprudence	3.000	B+	9.999								
LAW	75724	IP & Entrepreneur Law Cln	5.000	A-	18.335								
LAW	75753	Journal of Legislation	1.000	S	0.000								
		Total			57.670	17.000	17.000	16.000	3.604	64.000	64.000	46.000	3.645
Honor Roll													
Fall Semester 2021													
Law School													
LAW	70201	Evidence	3.000	A	12.000								
LAW	70312	Suing the Federal Government	3.000	A-	11.001								
LAW	70433	Law of International Trade	3.000	A-	11.001								
LAW	73311	Judicial Process Seminar	2.000	A-	7.334								
LAW	75753	Journal of Legislation	1.000	S	0.000								
LAW	76103	Directed Readings	2.000	S	0.000								
Good Standing		Total			41.336	14.000	14.000	11.000	3.758	78.000	78.000	57.000	3.667
Honor Roll													
Spring Semester 2022													
IN PROGRESS WORK													
LAW	70216 M	Adv Legal Research: Tax	1.000	IN PROGRESS									
LAW	73403 M	Foreign Corrupt Practices Act	2.000	IN PROGRESS									
LAW	75709 M	Trial Advocacy Comprehensive	4.000	IN PROGRESS									
LAW	75715 M	Deposition Skills	3.000	IN PROGRESS									
LAW	75753 M	Journal of Legislation	1.000	IN PROGRESS									
LAW	76103 M	Directed Readings	1.000	IN PROGRESS									
		In Progress Credits	12.000										

CONTINUED ON PAGE 3

UNIVERSITY OF NOTRE DAME

NOTRE DAME, INDIANA 46556

Butler, Jeffrey A.
 Student ID: XXXXX9860

Date Issued: 21-MAR-2022
 Page: 3

Birth Date: 04-07-XXXX

***** TRANSCRIPT TOTALS *****

NOTRE DAME	Ehrs:	78.000	QPts:	209.006
	GPA-Hrs:	57.000	GPA:	3.667
TRANSFER	Ehrs:	0.000	QPts:	0.000
	GPA-Hrs:	0.000	GPA:	0.000
OVERALL	Ehrs:	78.000	QPts:	209.006
	GPA-Hrs:	57.000	GPA:	3.667

***** END OF TRANSCRIPT *****

CAMPUS CODES

All courses taught at an off campus location will have a campus code listed before the course title.

The most frequently used codes are:

AF	Angers, France
DC	Washington, DC
FA	Fremantle, Australia
IA	Innsbruck, Austria
IR	Dublin, Ireland
LA	London, England (Fall/Spring)
LE	London, England (Law-JD)
LG	London, England (Summer EG)
LS	London, England (Summer AL)
PA	Perth, Australia
PM	Puebla, Mexico
RE	Rome, Italy
RI	Rome, Italy (Architecture)
SC	Santiago, Chile
SP	Toledo, Spain

For a complete list of codes, please see the following website:
<http://registrar.nd.edu/pdf/campuscodes.pdf>

GRADING SYSTEM - SEMESTER CALENDAR

Previous grading systems as well as complete explanations are available at the following website:

<http://registrar.nd.edu/students/gradefinal.php>

August 1988 - Present

Letter Grade	Point Value	Legend
A	4	
A-	3.667	
B+	3.333	
B	3	
B-	2.667	
C+	2.333	
C	2	Lowest passing grade for graduate students.
C-	1.667	
D	1	Lowest passing grade for undergraduate students.
F	0	Failure
F*	0	No final grade reported for an individual student (Registrar assigned).
X	0	Given with the approval of the student's dean in extenuating circumstances beyond the control of the student. It reverts to "F" if not changed within 30 days after the beginning of the next semester in which the student is enrolled.

I	0	Incomplete (reserved for advanced students in advanced studies courses only). It is a temporary and unacceptable grade indicating a failure to complete work in a course. The course work must be completed and the "I" changed according to the appropriate Academic Code.
U		Unsatisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).

Grades which are not Included in the Computation of the Average

S	Satisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).
V	Auditor (Graduate students only).
W	Discontinued with permission. To secure a "W" the student must have the authorization of the dean.
P	Pass in a course taken on a pass-fail basis.
NR	Not reported. Final grade(s) not reported by the instructor due to extenuating circumstances.
NC	No credit in a course taken on a pass-no credit basis.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: <http://registrar.nd.edu/students/gradefinal.php>

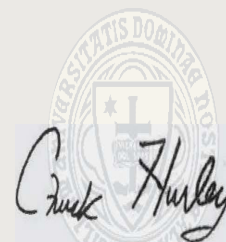
THE LAW SCHOOL GRADING SYSTEM

The current grading system for the law school is as follows: A (4.000), A- (3.667), B+ (3.333), B (3.000), B- (2.667), C+ (2.333), C (2.000), C- (1.667), D (1.000), F or U (0.000).

Effective academic year 2011-2012, the law school implemented a grade normalization policy, with mandatory mean ranges (for any course with 10 or more students) and mandatory distribution ranges (for any course with 25 or more students). For Legal Writing (I & II) only, the mean requirement will apply but the distribution requirement will not apply. The mean ranges are as follows: for all first-year courses (except for the first-year elective, which is treated as an upper-level course), the mean is 3.25 to 3.30; for large upper-level courses (25 or more students), the mean is 3.25 to 3.35; for small upper-level courses (10-24 students), the mean is 3.15 to 3.45.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: <http://registrar.nd.edu/students/gradefinal.php>

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CHUCK HURLEY, UNIVERSITY REGISTRAR

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COURSE NUMBERING SYSTEM

Previous course numbering systems (prior to Summer 2005) are available at the following website:

http://registrar.nd.edu/faculty/course_numbering.php

Beginning in Summer 2005, all courses offered are five numeric digits long (e.g. ENGL 43715).

The first digit of the course number indicates the level of the course.

ENGL 0 X - XXX	= Pre-College course
ENGL 1 X - XXX	= Freshman Level course
ENGL 2 X - XXX	= Sophomore Level course
ENGL 3 X - XXX	= Junior Level course
ENGL 4 X - XXX	= Senior Level course
ENGL 5 X - XXX	= 5th Year Senior / Advanced Undergraduate Course
ENGL 6 X - XXX	= 1st Year Graduate Level Course
ENGL 7 X - XXX	= 2nd Year Graduate Level Course (MBA / LAW)
ENGL 8 X - XXX	= 3rd Year Graduate Level Course (MBA / LAW)
ENGL 9 X - XXX	= Upper Level Graduate Level Course

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Transcripts, Certification and Diploma Department

1210 LSA Building
500 S. State Street
Ann Arbor, MI 48109-1382
Phone: 734-763-9066 Fax: 734-764-5556
ro.umich.edu

University of Michigan Statement of Authenticity

Transcript of: Jeffrey Alexander Butler

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Academic Transcript of: BUTLERJEFFREY ALEXANDER 41127272 E1465066-01 25-JAN-2016 Page 1

STUDENT NAME STUDENT ID NUMBER CONTROL NUMBER DATE ISSUED

2427156194

STATE OF MICHIGAN UIC

UNIVERSITY OF MICHIGAN

OFFICE OF THE REGISTRAR - ANN ARBOR, MI 48109-1382



Paul Robinson
University Registrar

		Winter 2012	Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
UNIVERSITY OF MICHIGAN DEGREES AWARDED		COMM 101	Mass Media	C	4.00	4.00	4.00	8.00
		LING 111	Intro to Language	B+	3.00	3.00	3.00	9.90
SCHOOL/COLLEGE: Literature, Science & the Arts		POLSCI 314	Am Pol Parties	C-	4.00	4.00	4.00	6.80
MAJOR: Political Science		SPANISH 231	Second Year Span	C+	4.00	4.00	4.00	9.20
MAJOR: History		Term Total	GPA:	2.260	15.00	15.00	15.00	33.90
DEGREE: Bachelor of Arts								
AWARDED: 23-DEC-2015								

NON-UNIVERSITY OF MICHIGAN ACADEMIC EXPERIENCE

		Fall 2012	Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
ADVANCED PLACEMENT AND EXAMINATION CREDIT		COMM 102	Process & Effects	C-	4.00	4.00	4.00	6.80
MATH 120 AP CALCULUS CREDIT I		EARTH 114	Global Warming	B+	1.00	1.00	1.00	3.30
POLSCI 111 INTRO AMER POL		POLSCI 101	Intro Pol Thry	B	4.00	4.00	4.00	12.00
		SOC 368	Criminology	B	4.00	4.00	4.00	12.00
		Term Total	GPA:	2.623	13.00	13.00	13.00	34.10

BEGINNING OF UNDERGRADUATE RECORD

		Winter 2013	Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
Transfer Course Credit Accepted towards		EARTH 104	Ice Ages	B+	1.00	1.00	1.00	3.30
Undergraduate L S & A		HISTART 272	Modern Art	B-	4.00	4.00	4.00	10.80
Fall 2011		HISTORY 103	Intro to History-HU	B-	4.00	4.00	4.00	10.80
ENGLISH 124 Writing Literature								
POLSCI 160 Intr World Pol								
SPANISH 103 Review-Elementary								
		PHYSICS 288	Physics of Music	B+	3.00	3.00	3.00	9.90
		PSYCH 111	Intro Psych	B	4.00	4.00	4.00	12.00
		Term Total	GPA:	2.925	16.00	16.00	16.00	46.80
Term Total		GPA:	2.666	12.00	12.00	12.00	12.00	32.00

Continued on page 2

Continued on next column

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Academic Transcript of: BUTLERJEFFREY ALEXANDER 41127272 E1465066-01 25-JAN-2016 Page 2

STUDENT NAME STUDENT ID NUMBER CONTROL NUMBER DATE ISSUED

2427156194
STATE OF MICHIGAN UIC

UNIVERSITY OF MICHIGAN

OFFICE OF THE REGISTRAR - ANN ARBOR, MI 48109-1382



Paul Robinson
University Registrar

Fall 2013	Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP	Fall 2015	Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
HISTORY 239	World Before 1492	C+	4.00	4.00	4.00	9.20	EARTH 108	When Earth Attacks	A	1.00	1.00	1.00	4.00
POLSCI 301	Pol Thot-Mod	C	3.00	3.00	3.00	6.00	HISTORY 312	European Integration	A	4.00	4.00	4.00	16.00
POLSCI 307	Topics in Am Pol Tht	B+	3.00	3.00	3.00	9.90	HISTORY 329	SS History Topics	A	4.00	4.00	4.00	16.00
	American Political Thought: 1630-1865							Crime and Drugs in Modern America					
POLSCI 337	Compar Const Design	B	3.00	3.00	3.00	9.00	HISTORY 497	Hist Colloquium	B+	4.00	4.00	4.00	13.20
POLSCI 381	Pol Science Research	B	3.00	3.00	3.00	9.00		Crusade & Jihad					
Term Total	GPA: 2.693		16.00	16.00	16.00	43.10	SPANISH 232	Second Year Span	B	4.00	4.00	4.00	12.00
								Rhythms of Latin Music and Culture					
Winter 2014	Undergraduate L S & A						Term Total	GPA: 3.600		17.00	17.00	17.00	61.20
HISTORY 244	Arab-Israeli Conflic	B+	4.00	4.00	4.00	13.20							
HISTORY 261	U S 1865-Present	A	4.00	4.00	4.00	16.00	Undergraduate L S & A						
	Issues in Race & Ethnicity						Cumulative Total	GPA: 3.020		120.00	126.00	362.50	
POLSCI 315	Media&Public Opinion	A	4.00	4.00	4.00	14.80							
POLSCI 490	Game Theory&Modls	B+	4.00	4.00	4.00	13.20	UNDERGRADUATE REMARKS						
Term Total	GPA: 3.575		16.00	16.00	16.00	57.20	01-MAY-2014	UNIVERSITY HONORS					
Winter 2015	Undergraduate L S & A						30-APR-2015	UNIVERSITY HONORS					
EARTH 103	Dinosaurs	B-	1.00	1.00	1.00	2.70	23-DEC-2015	UNIVERSITY HONORS					
HISTORY 202	Doing History	B	3.00	3.00	3.00	9.90	END OF UNDERGRADUATE RECORD						
HISTORY 260	U S to 1865	A	4.00	4.00	4.00	14.80							
	Honors												
HISTORY 322	Origins Of Nazism	A-	4.00	4.00	4.00	14.80							
HISTORY 328	HU History Topics	A	3.00	3.00	3.00	12.00							
	Sex and Gender in U.S. History, 1600-2000												
Term Total	GPA: 3.613		15.00	15.00	15.00	54.20							

Continued on next column

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TRANSCRIPT GUIDE

DEFINITION OF AN OFFICIAL TRANSCRIPT

An Official Transcript is one that has been received directly from the issuing institution. It must bear the University seal, date and signature of the registrar. Transcripts received that do not meet these requirements should not be considered official and should be routinely rejected for any permanent use. This definition of an official transcript has been endorsed by the Michigan Association of Collegiate Registrars and Admissions Officers.

ACCREDITATION

The three campuses of the University of Michigan are accredited by the North Central Association of Colleges and Schools - Higher Learning Commission. Many of the departments and programs within the University are also accredited by various agencies. Detailed information about these agencies and the accreditation process is available from the Dean's office of each academic unit.

CALENDAR

The University of Michigan operates under the trimester calendar. A unit of credit is a semester hour.

ELIGIBILITY FOR ENROLLMENT

Unless otherwise indicated, a student is eligible to enroll.

EXPLANATION OF COLUMN HEADINGS

HRS = Elected Hours/Units; MSH = GPA Semester Hours; CTP = Credit Toward Program; MHP = GPA Honor Points.

ABBREVIATIONS FOR CREDIT CONDITIONS

AGC = Approved for Graduate Credit; CBE = Credit by Exam; DCO = Degree Credit Only; NDC = Not for Undergraduate degree credit; NFC = Not for Credit; NGD = Not for Graduate Degree Credit; REP = Repetition.

STUDY ABROAD

Study abroad credit is considered upper level unless otherwise noted.

LETTER GRADES

9.0 GRADING SCALE (A+ through B = Pass unless otherwise noted)

A+ = 9.0; A = 8.0; A- = 7.0; B+ = 6.0; B = 5.0; B- = 4.0; C+ = 3.0; C = 2.0; C- = 1.0; D+ = 0.0; D = 0.0; D- = 0.0; E = 0.0.

4.4 GRADING SCALE

A+ = 4.4; A = 4.0; A- = 3.7; B+ = 3.4; B = 3.0; B- = 2.7; C+ = 2.4; C = 2.0; C- = 1.7; D+ = 1.4; D = 1.0; D- = 0.7; E = 0.0.

4.3 GRADING SCALE

A+ = 4.3; A = 4.0; A- = 3.7; B+ = 3.3; B = 3.0; B- = 2.7; C+ = 2.3; C = 2.0; C- = 1.7; D+ = 1.3; D = 1.0; D- = 0.7; E = 0.0.

4.0 GRADING SCALE

A+ = 4.0; A = 4.0; A- = 3.7; B+ = 3.3; B = 3.0; B- = 2.7; C+ = 2.3; C = 2.0; C- = 1.7; D+ = 1.3; D = 1.0; D- = 0.7; E = 0.0.

ADDITIONAL GRADES

EX = EXCELLENT; GD = GOOD; PS = PASS; LP = LOW PASS; F = FAIL (EX, GD, PS and LP = Pass)

CR = Credit; NC = No credit; S = Satisfactory; U = Unsatisfactory; P = Pass; F = Fail;

I = Incomplete (I OR IL followed by a letter grade indicates an initial incomplete that has been given a final grade.); NR = No grade reported;

= Grade not submitted; ED = Unofficial drop; VI = Audit or Visit; W = Withdrew from course; Y = Extended multi-term class

M = Marginal; IPL = Incomplete Permanent Lapse

COMPUTATIONS FOR TERM OR CUMULATIVE GPA: Term GPA = Term MHP/Term MSH; Cumulative GPA = Cumulative MHP/Cumulative MSH; Example: 42.0 MHP/12.0 MSH = 3.5 GPA.

Professor Jay Tidmarsh
University of Notre Dame Law School
Post Office Box 780
Notre Dame, Indiana 46556

April 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: *Recommendation for Jeffrey Butler*

Dear Judge Liman:

I write to recommend Jeff Butler for a position as a law clerk in your chambers. Jeff will graduate from Notre Dame Law School this upcoming spring. He was a student of mine in Civil Procedure as a 1L and again as a 3L in a seminar entitled Suing the Federal Government. In both classes, Jeff again was one of my favorite students. Jeff and I often talked after class or in my office, and we even stayed in touch during his second year. Our discussions are always far-ranging, and he may be among the students that I know best in his class. Everything that I know leads me to believe that he will make an exceptional law clerk.

Like most of the students I teach, Jeff is smart, articulate, and hard-working. But on each of those dimensions, Jeff is definitely memorable — a cut far above the ordinary. He is exceptionally quick to grasp the central point, and he is able to make and defend arguments with ease. Big ideas capture his imagination, but he also has a strong practical bent: he wants to understand what difference one view or another has on people in the real world. He also possesses a lot of common sense so that he can imagine these consequences more easily than most students. Jeff is unfailingly prepared, is one of the students most willing to contribute to class discussion, and is always poised under pressure. He enjoys the fine points of legal doctrine and does not approach a legal question with a pre-conceived idea about what the answer should be.

The paper that he wrote for Suing the Federal Government was quintessentially Jeff. He took on one of the biggest cross-cutting themes of the class: under what circumstances does the "private person" analogy work to justify waivers of federal sovereign immunity, and when must that analogy be abandoned to allow the government to govern without fear of liability? I also regarded it as one of the very best papers in the class. You might notice that he received only an A- for the paper. Please let me explain. Jeff's paper, in my books, was an A. Unfortunately, I was constrained by the grading curve, which required that I meet a 3.60 maximum for the class. The papers in the class were the most exceptional in quality that I have ever received. What I did to fit the students onto the curve was to flatten the curve and give almost all of the students an A-, with a few B+ grades. Some of the A- papers were, in fact, worthy of an A-, but there were a handful of papers, like Jeff's, that deserved a better fate than I gave them.

Jeff's academic record at Notre Dame tells much the same story about his academic ability. I do not have his fall 2021 grades, but at the end of his second year, Jeff had a 3.64 GPA. This is very good for Notre Dame, which has a mandatory curve that keeps the class average around a B+ (3.33), except in smaller classes. Given the pandemic, students could opt for pass-fail grades in spring 2020, so precise comparisons to past years are a bit tricky, but as a rule, we will graduate perhaps 15 percent of the class at the level of magna cum laude (a 3.60 GPA) or above. Many of those students get across the 3.60 line in their third year when GPAs tend to rise slightly. For Jeff already to have achieved a 3.64 GPA suggests to me that he is easily in the top fifteen percent of his class. Personally, in view of the qualities of his mind to think about big issues, I might put him a bit higher: top ten percent. Jeff also serves on the Journal of Legislation, where I am sure that he has worked to hone his research, writing, and editing — all skills critical to a law clerk. While I never make a recommendation principally on grades when I know a student's abilities well, in this case, Jeff's academic performance essentially confirms my impression of him.

As I said, Jeff is also one of my favorite students. On a personal level, he is always friendly and upbeat. He has a good sense of humor and a can-do approach to work. He is organized and respectful. I expect that he would be an absolute pleasure to work with in chambers. To my knowledge, he has the highest ethical standards.

In short, I recommend Jeff for a clerkship in the highest terms. He will be an outstanding law clerk.

Please contact me if you have any further questions. Thank you for your time and consideration of Jeff.

Sincerely,

Jay Tidmarsh

Jay Tidmarsh - jtidsmars@nd.edu - 574-631-6985

Notre Dame Law School
P. O. Box 780
Notre Dame, IN 46556

March 30, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing to strongly recommend Jeff Butler as a judicial law clerk in your chambers. He is absolutely fantastic. I have known Jeff for the past two years during which he has taken four of my classes, all of which were paper classes. In addition, I have supervised a directed reading last semester that resulted in an outstanding paper. Based on those experiences, I can say with confidence that Jeff Butler is one of the best student writers I have ever had at Notre Dame Law School. His writing is clear, organized, thoughtful, and interesting. In every class, he approached me several times throughout the semester to organize his outline, update me on his draft, and ensure that he was on the right track. He was never high maintenance, but always diligent. I have absolute confidence that any judge who hires Jeff Butler will be more than pleased with his work product.

Beyond his writing skills, he has many other attributes that will ensure his success. He is thoughtful, reliable, careful, serious, and wicked smart. In essence, what I am trying to convey is that if you hire Jeff Butler, you can relax, confident that he will perform every task to the absolute highest standards.

I strongly encourage you to interview him and see for yourself. You can reach me at ralford@nd.edu or by telephone at 574-631-3771 or my cell 310-729-3924.

Sincerely,

Roger Alford
Professor of Law

Roger Alford - ralford@nd.edu - (574) 631-3771

March 30, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I understand that Jeff Butler has applied to you for a clerkship. Jeff has been an excellent student at the Notre Dame Law School, and I believe he would serve you very well as a law clerk.

Jeff was my student in Constitutional Law during his first year of law school. This course was live for eight weeks before the University pivoted to online learning in response to the Covid situation. Because of that situation, Jeff took the course pass/fail rather than for a grade, but I can tell you that his exam was one of the top exams in the class of 77 students. The exam raised complex questions of standing, congressional power, executive power, state sovereignty, preemption, and constitutional and statutory interpretation—among others—some drawn from real cases. Jeff identified almost every issue the exam raised and analyzed them with a depth and sophistication that far surpassed that of most of his classmates.

The next semester, Fall 2020, Jeff was my student in Federal Courts. He again excelled.

This class attracts our best students, but our mandatory curve allows me to give very few straight As. Thus, although Jeff earned an A-, his exam was only a couple points shy of a straight A on a scale of 180 points. In other words, that Jeff earned an A- rather than a straight A reflects a negligible difference. As in Constitutional Law, Jeff had no trouble identifying the issues the exam raised—including questions of standing, qualified immunity, section 1983, subject-matter jurisdiction, habeas corpus, among many others—and reducing complex legal problems to the core questions in dispute.

Jeff and I have had many discussions outside of class during his time at Notre Dame. On a personal level, he is mature, respectful, and kind—and the sort of person who fully commits himself to the responsibilities he assumes. Jeff has told me with pride about the years of effort he devoted to becoming an Eagle Scout, including a 100-hour service project restoring the grounds of a museum in his hometown. He also speaks with pride about how, after botching an interview to work on a gubernatorial campaign, he volunteered as an intern, enduring a long commute and long hours for several weeks before the campaign offered him a paid full-time position. These experiences did not surprise me because I have seen Jeff's work ethic and persistence firsthand in my classes at Notre Dame. I expect that Jeff will find great success in the law given his tireless work ethic and keen intellect.

In short, I am happy to recommend Jeff Butler to serve as your law clerk, and I hope that you will interview him. If I can provide any additional information, please do not hesitate to let me know.

Sincerely,

Anthony J. Bellia Jr.
O'Toole Professor

Anthony Bellia - Anthony.J.Bellia.3@nd.edu - 574-631-9353

Anthony Bellia - Anthony.J.Bellia.3@nd.edu - 574-631-9353

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JEFFREY BUTLER WRITING SAMPLE

This writing sample is a summary judgment brief submitted for my legal writing class. For length purposes the introduction and statement of the facts have been redacted. The brief focuses on a covenant not to compete between a doctor (Dr. Baker) and her former employer (Community Care). Dr. Baker left her former employer that focused on cardiovascular surgery to start her own clinic based on preventative care. The brief argues summary judgment should be granted for Dr. Baker under Wisconsin competition law.

ARGUMENT

Under Wisconsin statute section 802.08 summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Wis. Stat. §802.08 (2008). Summary judgment is proper when there is no genuine issue of material fact in dispute relative to the reasonableness of the agreement. *Wausau*, 514 N.W.2d 38.

Summary judgment should be granted for Dr. Baker and Community Care because there is no genuine issue of material fact in dispute relative to reasonableness of the agreement. An agreement not to compete is enforceable under Wisconsin statute section 103.465 when a restrictive covenant is “reasonably necessary” for the protection of the employer. Wis. Stat. §103.465 (2015). The Supreme Court of Wisconsin mandates a five part test to prove a covenant is “reasonably necessary.” An agreement must: (1) be necessary for the protection of the employer, (2) provide a reasonable time period, (3) cover a reasonable territory, (4) not be unreasonable as to the employee, (5) and not be unreasonable as to the general public. *Chuck Wagon*, 277 N.W.2d 787. Restrictive covenants are prima facie suspect and strictly construed against the employer. *Wausau*, 514 N.W.2d 34. Due to no genuine issue of material fact regarding the restrictive covenant not being necessary for UC’s protection and it being unreasonable to the general public, summary judgment should be granted for Dr. Baker and Community Care.

I. UC’S RESTRICTIVE COVENANT IS NOT NECESSARY FOR UC’S PROTECTION THEREFORE SUMMARY JUDGMENT SHOULD BE GRANTED.

Summary judgment should be granted for Dr. Baker and Community Care because UC’s restrictive covenant is not necessary for UC’s protection and therefore unenforceable. The Supreme Court of Wisconsin mandates that one of the five elements necessary to prove that a restrictive covenant is enforceable is that it is necessary for the employer’s protection. *Chuck Wagon*, 277 N.W.2d 787. First, when unique skills obtained through employment will not be used

to compete a restrictive covenant is not necessary. *Wausau*, 514 N.W.2d 34. Second, when the employee does not have special relationships with the employer's customers a covenant is not necessary. *Chuck Wagon*, 277 N.W.2d 787. Finally, when the employee cannot benefit from an employer's goodwill and referrals a covenant is not necessary. *Fields*, 309 N.W.2d 125.

Unique skills developed by employees through their work for the employer used to compete directly can create a protectable interest for the employer. *Wausau*, 514 N.W.2d 34. In *Wausau*, the appellate court found that skills acquired by a vascular surgeon before employment with a medical center were not a protectible interest. *Id.* at 40. The medical center argued it acquired a protectible interest because the vascular surgeon performed unique specialized services during his employment. The surgeon did not learn any additional unique skills from the medical center because he was the only vascular surgeon. The court found that the medical center did not establish that the surgeon's unique skills were acquired during his employment, so those skills were not a protectible interest and not necessary for the protection of the employer. *Id.* Similarly, in *Fields*, the appellate court found that experience and skill gained during employment by a physician did not justify a restrictive covenant, but other factors did in that case. *Fields*, 309 N.W.2d 130. The physician had performed 500 abortions prior to employment and gained experience performing abortions for his employer during his tenure. The court found that the law affords no recourse against a departing employee who takes only his experience with him. *Id.*

When an employee's special relationship with an employer's customers can be used to compete against the employer there can be a protectible interest. *Chuck Wagon*, 277 N.W.2d 787. In *Chuck Wagon*, the Supreme Court held a food truck owner's restrictive covenant not to compete with its food truck driver was enforceable. *Id.* The food truck owner developed and serviced the route's customers. The owner leased out exclusive access to the route to a food truck

driver to resell the owner's products to the route customers. When the food truck driver left his employer, he kept servicing the same route and customers. *Id.* at 789. The owner's new employees tried to retain the customers by offering discounted food prices and free coffee but the customers remained with the former driver. The court held that the unique relationship the food truck driver developed with the customers resulted in control over them and was thus a protectible interest that made the covenant necessary for the employer's protection. *Id.* at 792-93. Similarly, when a salesman left for a rival company, the Supreme Court found his relationship with his former company's customers to be a protectible interest. *Lakeside Oil Co. v. Slutsky*, 98 N.W.2d 415 (Wis. 1959). The salesman joined and invested in a rival company selling similar products. Finding the salesman had a special relationship with his former company's customers and was able to persuade them buy his products, the court held that the customer relationship was a protectible interest and made the covenant necessary for the employer's protection. *Id.* at 419. *See also Central Watch, Inc. v. Central Control Alarm Corp.*, 22 B.R. 568 (Bankr. E.D. Wis. 1982) (relationships between a security company's former president and customers ensuing loyalty to the former employee created a protectible interest resulting in a covenant necessary for the employer's protection).

Finally, when an employee can use an employer's goodwill and referrals to compete, a protectible interest can exist. In *Fields*, the appellate court affirmed a lower court's decision to enforce an abortion clinic's covenant not to compete with a doctor. *Id.* The doctor was the sole physician during most of his tenure at a well-known, established and well-respected abortion clinic that received 81% of business through referrals. *Id.* at 129. The doctor left the clinic to open his own practice and started contracting with referral agencies as well as other physicians and copied the abortion clinic's own referral lists to establish his own practice. *Id.* at 129-30. The doctor was

using referrals and goodwill to compete with his former employer therefore the court held that the covenant was necessary for the employer's protection. *Id.* at 130. Conversely in *Wausau*, the appellate court held that a vascular surgeon who started his own practice was not using his former employer's referrals to compete against it. *Wausau*, 514 N.W.2d at 34. The vascular surgeon terminated his employment and started his own practice where in the first year of service less than 0.5% of his patient charges came from his former employer's patients. *Id.* at 37, 40. The surgeon was not using referrals or goodwill therefore the court found that the covenant was not necessary for the employer's protection. *Id.* at 40.

Here, Summary Judgment should be granted for Dr. Baker and Community Care because there is no genuine issue of material fact that UC's restrictive covenant is not necessary for its protection. First, Dr. Baker uses no special skills she developed at UC to compete with it so no protectible interest exists. Community Care does not have any of the equipment needed to perform the Roscoe Procedure. Dr. Baker's treatment focuses on low intervention in contrast to UC's high intervention. Community Care stresses lifestyle changes and runs information sessions and support groups. In *Wausau*, the vascular surgeon had developed his surgery skills before his employment with the medical clinic. The court found his skills were not a protectible interest. Similarly, here Dr. Baker performs basic cardiology skills which even Dr. Roscoe concedes she learned at UW Madison during her residency. In *Fields*, the physician had performed abortions before his tenure with his employer. The experience and skill that he obtained performing abortions at the medical clinic did not itself amount to a protectible interest. This is also the case here. Any additional skill and experience Dr. Baker gained at UC is not a protectible interest.

Next, Dr. Baker's relationships with UC's customers is also not a protectible interest. UC serves exclusively well-insured wealthy clients from across the country and it does not accept

Medicaid or Medicare. Conversely, Community Care and Dr. Baker accept both and assist patients who do not have insurance or have high deductible plans. In *Chuck Wagon*, the food truck owner's products were so undifferentiable that the loyal customers stopped using the owner's products, even at discounted or free prices after the former driver took the customers with him. Here UC's main "product" that attracts patients is the Roscoe Procedure which is not even offered by Community Care. Community Care does not serve the same customers as UC unlike in *Chuck Wagon* where the former driver and food truck company did. Consequently Dr. Baker cannot use relationships with UC's customers. Therefore, any relationships gained by Dr. Baker will not be a protectible interest. In *Slutsky* the company's sole salesman joined a rival small company selling similar products and attempted to service the same customers whom were loyal to him. Unlike Dr. Baker who was one of fifteen physicians at UC and was never asked for by name. She has not assisted one patient from UC and does not plan to service any well insured wealthy patients in the future due her intention to only assist lesser insured individuals. Therefore Dr. Baker's relationships with UC's customers are not a protectible interest.

Finally, Dr. Baker will not use UC's goodwill and referrals to compete so there is no protectible interest. Dr. Baker is planning to service local, lesser insured, clients unlike the wealthy, well-insured national clients UC services. Both Dr. Roscoe and Ms. Williams conceded Dr. Baker was not the face of the clinic and not a prominent member of the practice. Dr. Roscoe was the only employee named in the advertising. Unlike in *Fields*, where 81% of the abortion clinic's business was based on referral and the doctor copied the clinic's referral lists to start his new practice here Dr. Baker does not rely on referrals supplied to UC. Her local, uninsured clients would not come from the same referral network that supplies well-insured national customers to UC. Therefore Dr. Baker will not use referrals to compete. This case is closer to that in *Wausau*, where less than 0.5%

of the vascular surgeon's client charges at his new practice were by patients from his old employer. The court ruled a restrictive covenant was not necessary. Similarly, Community Care has had no customer overlap and will not due to the different customer base Dr. Baker seeks to service. Therefore Dr. Baker will not use any customer goodwill and referrals to compete so there is no protectible interest.

Therefore, Dr. Baker and Community Care are entitled to summary judgment because the restrictive covenant is not necessary for UC's protection. First Dr. Baker uses no special skills she learned at UC to compete with it. She focuses on basic cardiology services like lifestyle choices she learned in residency compared to UC's Roscoe Procedure. Next, Dr. Baker's relationships with UC's customers is not a protectible interest. Dr. Baker was one of fifteen physicians at UC and was never asked for by name and plans to serve completely different patients UC does not accept. Finally, UC's goodwill or referrals is not a protectible interest because Dr. Baker will not use them. She was not a prominent member of UC and the different client base would not provide an overlap for referrals. Considering there is no genuine issue of material fact that UC's restrictive covenant is not necessary for its protection summary judgment should be granted.

II. UC'S RESTRICTIVE COVENANT IS UNREASONABLE TO THE GENERAL PUBLIC THEREFORE SUMMARY JUDGMENT SHOULD BE GRANTED.

Alternatively, Summary Judgment should be granted for Dr. Baker and Community Care because UC's restrictive covenant is unreasonable to the general public and therefore unenforceable. The Supreme Court of Wisconsin mandates that the fifth element necessary to prove that a restrictive covenant is enforceable is that it is reasonable to the general public. *Chuck Wagon*, 277 N.W.2d 787. The interest of the public in having access to the employee's particular services during the time and in the area should be weighed when evaluating the reasonableness of the restrictive covenant. *Lakeside Oil Co*, 98 N.W.2d 415. A restrictive

covenant is unreasonable to the public when it is contrary to public policy by creating a shortage of a certain kind of service. *Pollack v. Calimag*, 458 N.W.2d 599 (Wis. Ct. App. 1990). In *Pollack*, the appellate court found that a medical clinic's restrictive covenant not to compete with an osteopathic physician was enforceable. The physician agreed not to compete within 20 miles of his former clinic. The court found that the presence of several other doctors of osteopathy practicing in the area signified that there was no shortage of service. Therefore, the agreement was not contrary to public policy and unreasonable to the public. *Id.*

Here, Dr. Baker's and Community Care's Motion for Summary Judgment should be granted because there is no genuine issue of material fact that UC's restrictive covenant is unreasonable to the general public. UC's restrictive covenant is contrary to public policy and creates a shortage of cardiology services in the area. Community Care serves uninsured or high deductible patients. It accepts Medicare and Medicaid. UC does not accept these patients and refers them to the hospital. Dr. Roscoe explained that the isolated area where Community Care is located has experienced a lot of business closures and has very few medical facilities of any kind. Dr. Baker explained Community Care is the only medical facility her patients can turn to and due to economic reasons were never able to access the healthy lifestyle she teaches. In contrast, in *Pollack*, the presence of other osteopathic physicians showed there was no shortage of osteopathy in the area making the restrictive covenant not to compete reasonable to the public. Here, the restrictive covenant against Dr. Baker and Community Care restricts cardiology services to the lesser insured or uninsured patients who due to economic reasons do not have access to these services otherwise. Therefore, UC's restrictive covenant is contrary to public policy and creates a shortage of cardiology services in the area. In conclusion summary judgment should be granted for Dr. Baker and Community Care because UC's restrictive covenant is

unreasonable to the general public.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' Motion for Summary Judgment, first because the restrictive covenant is not necessary for the employer's protection and, alternatively, because it is unreasonable to the general public.

6666

Applicant Details

First Name **Sarah**
 Middle Initial **C**
 Last Name **Butterfield**
 Citizenship Status **U. S. Citizen**
 Email Address scb9291@nyu.edu
 Address

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362 W 30th St., Apt. 3
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State/Territory
New York
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Country
United States

Contact Phone Number **2036857228**
 Other Phone Number **2033331901**

Applicant Education

BA/BS From **Tufts University**
 Date of BA/BS **May 2014**
 JD/LLB From **New York University School of Law**
<https://www.law.nyu.edu>
 Date of JD/LLB **May 1, 2022**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Review of Law and Social Change**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Azmy, Baher
BAzmy@ccrjustice.org
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Michael, DeSanctis
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212-998-6657

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sarah C. Butterfield
362 W 30th St., Apt. 3, NY, NY, 10001 | sarah.butterfield@law.nyu.edu

March 22, 2022

The Honorable Lewis J. Liman
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Dear Judge Liman:

I am a third-year law student at New York University School of Law and I write to apply for a clerkship in your chambers for the 2024-2025 term or any subsequent term.

I am particularly excited about a clerkship opportunity in your chambers in the Southern District of New York based on my commitment to practicing in New York in the long-term.

Enclosed please find my resume, a writing sample, and my law school transcripts. The writing sample is an excerpt from my 1L Lawyering Brief. Arriving separately are three letters of recommendation from the following individuals:

Professor Margaret Satterthwaite, NYU School of Law
Tel: (212) 998-6657 | Email: margaret.satterthwaite@nyu.edu

Professor Baher Azmy, NYU School of Law; Legal Director, Center for Constitutional Rights
Email (1): baa2023@nyu.edu | Email (2): bazmy@ccrjustice.org

Professor Michael DeSanctis, The George Washington University Law School
Tel: 202-257-1112 | Email: mdesanctis33@gmail.com

During my 2L year (Fall and Spring), I worked as a Research Assistant for Professor Satterthwaite and her team at the Global Justice Clinic. During the fall of my 2L year, I took Professor Azmy's Civil Rights Law course. Finally, Professor DeSanctis was my 1L Lawyering Professor and supervised my final first-year writing assignment.

Please let me know if I can provide any additional information. I can be reached by phone at (203) 685-7228, or by email at sarah.butterfield@law.nyu.edu. Thank you for considering my application.

Respectfully,

/s/

Sarah C. Butterfield

Sarah Butterfield

362 W 30th Street, New York, NY 10001
(203) 685-7228 | sarah.butterfield@law.nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

J.D. Candidate, May 2022. GPA: 3.751 (Unofficial).

Activities: Immigrants' Rights Clinic, Student Advocate (2021-2022)
Review of Law and Social Change, Digital Articles Editor (2021-2022); Staff Editor (2020-2021)
Just Security, Staff Editor (2021-2022)
 Center for Human Rights and Global Justice, Human Rights Scholar (2020-2021)
 International Refugee Assistance Project, Co-Author, Immigration Court Monitoring Report
 Ending the Prison Industrial Complex – Solitary Confinement Project, Team Member
 Transfer: The George Washington University Law School, Washington, D.C. (August 2019 – May 2020)
 Honors: George Washington Scholar (top 15% of class, as of Spring 2020)
 GW Law 2019 Public Interest Scholar
 Dean's Recognition for Professional Development

TUFTS UNIVERSITY, Medford, MA

B.A. in International Relations, with a Concentration in International Security and Arabic, May 2014

Senior Capstone Project: The Future of Islamism in Egypt

American University in Cairo – One-year exchange program (2012 – 2013)

EXPERIENCE

AFRICAN SERVICES COMMITTEE, New York, New York

Legal Intern, July 2021 – August 2021. Represented clients in a variety of immigration proceedings, including affirmative and defensive asylum, adjustment of status, removal of conditions, and special immigrant juvenile status. Conducted extensive legal and country of origin research, led communication with clients, and drafted full legal briefing.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, New York, New York

Summer Law Clerk, May 2021 – July 2021. Researched and drafted legal memoranda and court briefing on a variety of topics, notably white collar & criminal defense and commercial litigation.

PROFESSOR MARGARET SATTERTHWAITE AND GABRIELLE APOLLON (NYU LAW GLOBAL JUSTICE CLINIC), New York, New York

Research Assistant, September 2020 – May 2021. Conducted substantive research and provided editorial support for litigation before various regional human rights bodies, seeking to hold the U.S. and other states accountable for torture, rendition, and other forms of abuse.

AMERICAN FRIENDS SERVICE COMMITTEE, New York, New York

Legal Intern – Detention Team, January 2021 – May 2021. Conducted screenings with individuals in removal proceedings to assess legal assistance and representation needs and researches and prepares cases for detained individuals. Conducted legal research and drafted motions for detained individuals in removal proceedings. Represented clients in immigration court as oral advocate.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, New York, New York

Legal/Litigation Intern, May 2020 – July 2020. Conducted intake interviews to determine refugee claims, drafted asylum and special immigrant visa appeal briefs, conducted research on criteria that trigger inadmissibility, and prepared asylum-related employment applications. Conducted research on delays in follow-to-join applications, the CDC's COVID-19-related ban on asylum seekers and wrote memos on naturalization delays and the justiciability of special immigrant visa appeals.

ST. ANDREW'S REFUGEE SERVICES – REFUGEE LEGAL AID PROGRAM (RLAP), Cairo, Egypt

Senior Resettlement Legal Officer, August 2018 – June 2019; *Resettlement Legal Fellow*, January 2018 – August 2018. Conducted, as well as reviewed and synthesized, in-depth screening and intake interviews with refugees and asylum seekers seeking resettlement and/or protection in Egypt. Drafted legal submissions to UNHCR, IOM, and

international authorities on behalf of clients applying refugee law. Recruited, trained, and supervised legal officers and fellows doing client casework. Managed legal caseload of Syrian clients, including processing resettlement referrals, coordinating with UNHCR on resettlement cases, liaising with community-based organizations, and providing trainings on resettlement referrals. Coordinated case referrals between RLAP and StARS' Psychosocial program for clients requiring mental health assistance, including management of emergency intervention for high-risk clients. Advised up to 12 clients during each 4-hour on-call shift, providing advice and updates on resettlement cases, giving information on the current resettlement context in Egypt, and evaluating protection concerns and potential solutions.

FORCIER CONSULTING, Hargeisa, Somaliland and Cairo, Egypt

Analyst, June 2017 – June 2019, **Research Officer**, January 2016 – May 2017. Managed all aspects of small-scale and nationwide research projects including budget, methodology, research tool design, data analysis, report writing, and presentations to clients in Somalia, South Sudan, and Egypt. Conducted extensive desk research to inform creation of surveys and analytical reports on maternal and child health, gender-based violence, girls' education, and resilience building. Designed and conducted trainings for local staff on research tools and methods. Cleaned and analyzed qualitative and quantitative data on various projects (in statistical software packages STATA and SPSS). Supervised teams of up to 50 researchers and supported staff in the field during project execution, monitored and advised on security-related issues in the field, and organized all field logistics.

Business Development Officer, April 2015 – December 2015. Wrote proposals, including budgets and methodological design, for all projects in Forcier's countries of operation across the Middle East and Africa. Edited and revised financial and technical proposals of Junior Business Development Officers.

IBN KHALDUN CENTER FOR DEVELOPMENTAL STUDIES, Cairo, Egypt

Research Assistant, August 2014 – April 2015. Wrote White Paper analyzing legal status of female circumcision regarding criminal enforcement and statutory development of Egyptian law. Conducted interviews (in English and Arabic) with activists, Ministry of Health officials, and prosecutors. Wrote and designed publication on human rights violations from across the MENA region in 2014.

SELECTED PUBLICATIONS

Questions to Investigate U.S. Drone Strike in Kabul: An Alleged Killing of 10 Civilians, *Just Security* (Sep. 13, 2021).

Somali Women's Political Participation And Leadership: Evidence And Opportunities, In collaboration with the East Africa Research Fund, SD Direct, and Forcier (June 2017).

ADDITIONAL INFORMATION

Proficient in MSA Arabic; Intermediate Egyptian Arabic; Novice-level Spanish.

Name: Sarah C Butterfield
 Print Date: 11/26/2021
 Student ID: N12705663
 Institution ID: 002785
 Page: 1 of 1

New York University
 Beginning of School of Law Record

Transfer Credits

Transfer Credit from George Washington Univ/Law
 Applied to Fall 2020

Course	Description	Units
LAW 6202	Contracts	4.0
LAW 6206	Torts	4.0
LAW 6208	Property	4.0
LAW 6209	Legislation and Regulation	3.0
LAW 6210	Criminal Law	3.0
LAW 6212	Civil Procedure	4.0
LAW 6214	Constitutional Law I	3.0
LAW 6216	Fundamentals of Lawyering I	3.0
LAW 6217	Fundamentals of Lawyering II	3.0
LAW 6217	Fundamentals of Lawyering II	0.0
Transfer Totals:		30.0

Immigrant Rights Clinic Seminar	LAW-LW 10586	4.0	***
Instructor: Nancy B Morawetz Alina Das Jessica L Rofe			
Immigrant Rights Clinic	LAW-LW 11134	3.0	***
Instructor: Nancy B Morawetz Alina Das Jessica L Rofe			
Federal Courts and the Federal System	LAW-LW 11722	4.0	***
Instructor: Trevor W Morrison			
Review of Law & Social Change	LAW-LW 11928	1.0	***
Racial Justice and the Law	LAW-LW 12241	2.0	***
Instructor: Bryan A Stevenson			
Directed Research Option B	LAW-LW 12638	1.0	***
Instructor: Ryan Goodman			
		AHRS	EHRS
Current		15.0	0.0
Cumulative		49.0	56.0

Fall 2020

School of Law Juris Doctor Major: Law			
Civil Rights	LAW-LW 10265	3.0	A
Instructor: Baher A Azmy			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			
Immigration Law & Rights of Non Citizens	LAW-LW 11610	4.0	B
Instructor: Adam B Cox			
Research Assistant	LAW-LW 12589	2.0	CR
Instructor: Margaret Lockwood Satterthwaite			
Spanish for Beginners - Level II	SPAN-UA 2	4.0	A
Not applicable to current program			
Instructor: Laura Victoria Rojas Mora			
Not applicable to current program			
		AHRS	EHRS
Current		17.0	13.0
Cumulative		17.0	43.0

Spring 2021

School of Law Juris Doctor Major: Law			
Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	A-
Instructor: Andrew Weissmann			
International Humanitarian Law	LAW-LW 12259	4.0	A
Instructor: Ryan Goodman			
Refugee and Asylum Law Seminar	LAW-LW 12265	2.0	A-
Instructor: Anwen Hughes			
Lawyering for Transfers	LAW-LW 12627	3.0	CR
Instructor: Gary Michael Parsons			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR
Intermediate Spanish I	SPAN-UA 3	4.0	A-
Instructor: Pedro Mateo Guerrero			
Not applicable to current program			
		AHRS	EHRS
Current		17.0	13.0
Cumulative		34.0	56.0

Fall 2021

School of Law
 Juris Doctor
 Major: Law

Spring 2022

School of Law Juris Doctor Major: Law			
Complex Litigation	LAW-LW 10058	4.0	***
Instructor: Samuel Issacharoff Arthur R Miller			
Immigrant Rights Clinic Seminar	LAW-LW 10586	4.0	***
Instructor: Nancy B Morawetz Alina Das Jessica L Rofe			
Immigrant Rights Clinic	LAW-LW 11134	3.0	***
Instructor: Nancy B Morawetz Alina Das Jessica L Rofe			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	***
Instructor: Jeffrey A. Udell			
Review of Law & Social Change	LAW-LW 11928	1.0	***
		AHRS	EHRS
Current		14.0	0.0
Cumulative		63.0	56.0
Staff Editor - Review of Law & Social Change 2020-2021			

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW JD & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

The following guidelines represent NYU School of Law's current guidelines for the distribution of grades in a single course. Note that JD and LLM students take classes together and the entire class is graded on the same scale.

A+ = 0-2%	A = 7-13%	A- = 16-24%
B+ = 22-30%	B = Remainder	B- = 0-8% (First-Year JD); 4-11% (All other JD and LLM)
C/D/F = 0-5%	CR = Credit	IP = In Progress
EXC = Excused	FAB = Fail/Absence	FX = Failure for cheating
*** = Grade not yet submitted by faculty member		
Maximum for A tier = 31%; Maximum grades above B = 57%		

The guidelines for first-year JD courses are mandatory and binding on faculty members. In all other cases, they are advisory but strongly encouraged. These guidelines do not apply to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students taking the course for a letter grade.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after <u>two</u> semesters
Butler Scholar:	Top ten students in the class after <u>four</u> semesters
Florence Allen Scholar:	Top 10% of the class after <u>four</u> semesters
Robert McKay Scholar:	Top 25% of the class after <u>four</u> semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year or to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process for all NYU School of Law students is highly selective and seeks to enroll individuals of exceptional ability. The Committee on Admissions selects those candidates it considers to have the very strongest combination of qualifications and the very greatest potential to contribute to the NYU School of Law community and the legal profession. The Committee bases its decisions on intellectual potential, academic achievement, character, community involvement, and work experience. For the Class entering in Fall 2020 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 172/167 and 3.9/3.7. Because of the breadth of the backgrounds of LLM students and the fact that foreign-trained LLM students do not take the LSAT, their admission is based on their prior legal academic performance together with the other criteria described above.

Updated: 9/14/2020

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THE GEORGE WASHINGTON UNIVERSITY
OFFICE OF THE REGISTRAR
800 21ST STREET NW
WASHINGTON, DC 20052

TELEPHONE: 202-994-4900

Official Academic Transcript of:
SARAH C BUTTERFIELD
Transcript Created: 3-Jun-2020

Requested by:
SARAH C BUTTERFIELD
138 TOILSOME HILL ROAD
FAIRFIELD, CT 06825-1550

E-Mail: sbutterfield@law.gwu.edu



Document Type: THIRD-PARTY SECURE PDF

Intended Recipient:
SARAH BUTTERFIELD
138 TOILSOME HILL ROAD
FAIRFIELD, CT 06825-1550

E-Mail: sbutterfield@law.gwu.edu

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

Gwid : G49423105
Date of Birth: 26-JUN

Date Issued: 03-JUN-2020

Record of: Sarah C Butterfield

Page: 1

Student Level: Law
Admit Term: Fall 2019

Issued To: SARAH BUTTERFIELD
138 TOILSOME HILL ROAD
FAIRFIELD, CT 06825-1550

REFNUM:29797529

Current College(s): Law School
Current Major(s): Law

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS

GEORGE WASHINGTON UNIVERSITY CREDIT:

***** TRANSCRIPT TOTALS *****

Fall 2019
Law School
Law

Earned Hrs GPA Hrs Points GPA

LAW 6202	Contracts Cunningham	4.00	A-		
LAW 6206	Torts Karshtedt	4.00	A		
LAW 6212	Civil Procedure Clark	4.00	A+		
LAW 6216	Fundamentals Of Lawyering I Desanctis	3.00	B		
Ehrs	15.00 GPA-Hrs	15.00	GPA	3.800	
CUM	15.00 GPA-Hrs	15.00	GPA	3.800	
GEORGE WASHINGTON SCHOLAR					
TOP 1% - 15% OF THE CLASS TO DATE					

TOTAL INSTITUTION	31.00	15.00	57.00	3.800
OVERALL	31.00	15.00	57.00	3.800

***** END OF DOCUMENT *****

Spring 2020
Law School
Law

LAW 6208	Property	4.00	CR		
LAW 6209	Legislation And Regulation	3.00	CR		
LAW 6210	Criminal Law	3.00	CR		
LAW 6214	Constitutional Law I	3.00	CR		
LAW 6217	Fundamentals Of Lawyering II	3.00	CR		
Ehrs	16.00 GPA-Hrs	0.00	GPA	0.000	
CUM	31.00 GPA-Hrs	15.00	GPA	3.800	

...
DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION. ALL LAW SCHOOL COURSES FOR SPRING 2020 SEMESTER WERE GRADED ON A MANDATORY CREDIT/NO-CREDIT BASIS.
DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT

Fall 2020

LAW 6360	Criminal Procedure	3.00	-----
LAW 6380	Constitutional Law II	4.00	-----
LAW 6538	Immigration Law	3.00	-----
LAW 6623	Prisoner & Reentry Clinic	4.00	-----
Credits In Progress:		14.00	

***** CONTINUED ON NEXT COLUMN *****



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DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students.
700s	School of Business – Limited to doctoral students. The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and

School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit <http://go.gwu.edu/corcorantranscriptkey>

THE CONSORTIUM OF UNIVERSITIES OF
THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
CU	Catholic University of America	NVCC	Northern Virginia Community College
GC	Gallaudet University	PGCC	Prince George's Community College
GU	Georgetown University	SEU	Southeastern University
GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; B, Good; C, Satisfactory; D, Low Pass; F, Fail; I, Incomplete; IPG, In Progress; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; P, Pass; NP, No Pass; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the I is replaced by the final grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.

Effective Fall 2003: The grading symbol R indicates need to repeat course.

Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade.

Effective Fall 1987: The following grading symbols were added: A-, B+, B-, C+, C-, D+, D-.

Effective Summer 1980: The grading symbols: P, Pass, and NP, No Pass, replace CR, Credit, and NC, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) A, Excellent; B, Good; C, Minimum Pass; F, Failure; I, Incomplete; IPG, In Progress; CR, Credit; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 1994: The following grading symbols were added: A-, B+, B-, C+, C- grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; B+, B, B-, Good; C+, C, C-, Passing; D, Minimum Pass; F, Failure; CR, Credit; NC, No Credit; I, Incomplete. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

M.D. Program Grading System

H, Honors; HP, High Pass; P, Pass; F, Failure; IP, In Progress; I, Incomplete; CN, Conditional; W, Withdrawal; X, Exempt; CN/P, Conditional converted to Pass; CN/F, Conditional converted to Failure. Through Summer 2014 the I was replaced with I and the final grade.

For historical information not included in the transcript key, please visit

<http://www.gwu.edu/transcriptkey>

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Arts, Sciences, & Engineering
Dowling Hall
Medford, MA 02155

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College of Liberal Arts

Name: Sarah C. Butterfield
Student ID: 1105442 Birthdate: 06/26/###

Print Date: 07/20/2017 Page 1 of 3

Send To: Sarah C. Butterfield
138 Toilsome Hill Road
Fairfield, CT 06825

Advisor: Jeffrey Tallierro

Degree: Bachelor of Arts
Confir Date: 05/18/2014
Major - International Relations

Degrees Awarded

Test Credits Total

Course	Description	Earned
ENG 012	Ap English 5	1,000
HIST AP	Ap History	1,000

2,000

Other Credits Applied Toward College of Liberal Arts	Earned
SPN 0003	0.0
ENG 0001	0.0
Other Credits Total	0.0

Tufts Credits

Transfer Credits

Transfer Credit from American University in Cairo, Egypt
Applied Toward College of Liberal Arts Program

Course	Description	Earned
ARB 0320	Intro Colloquial Arabic	1.0
ARB 0022	Intermediate Arabic	1.0
ARB 0092	Arabic of the News Media	1.0
HIST 0320	ST Mod Egypt Hist: Isqat Al-Niza	1.0
PS 0330	Contemporary Political Islam	1.0
PS 0330	Global Politics in 20th Cent	1.0
PS 0330	Political Sociology	1.0
PS 0330	Politics of Human Rights	1.0
Total Transfer Credits		8.0

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JoAnn Jack
Registrar, Arts, Sciences & Engineering

Arts, Sciences, & Engineering
Dowling Hall
Medford, MA 02155

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College of Liberal Arts

Name: Sarah C. Butterfield
Student ID: 1105442 Birthdate: 06/26/###

Print Date: 07/20/2017 Page 2 of 3

Fall Term 2010

College of Liberal Arts					
Major - Undeclared					
Course	Description	Earned	Grade	Points	
AMER 0083	Freshman Seminar	1.0	B+	3.333	
ARB 0001	On The Road in America	1.0	B-	2.667	
EC 0005	Elem Mod Standard Arabic	1.0	C	2.000	
EXP 0008	Principles Economics	1.0	P	0.000	
	Perspectives Seminar				
	India Film & Crime				
	Pass/Fail				
PS 0061	Intro International Rel	1.0	B	3.000	
Term	GPA	Attempted	Earned	GPA Units	Points
Cumulative	2.75	5.00	7.0	4.00	11.00

Spring Term 2012

Course	Description	Earned	Grade	Points	
ARB 0003	Intermed Std Arabic	1.0	C+	2.333	
ENV 0007	Environmental Biology	1.0	B	3.000	
MATH 0010	Intro Special Topics	1.0	B	3.000	
PS 0160	Introductory Statistics	1.0	B	3.000	
SOC 0050	Force Strategy&arms Cntr	1.0	B+	3.333	
	Globalization&socialching				
Term	GPA	Attempted	Earned	GPA Units	Points
Cumulative	2.93	5.00	17.0	14.00	39.67

Spring Term 2011

Course	Description	Earned	Grade	Points
ARB 0002	Elem Mod Standard Arabic	1.0	B-	2.667
BIO 0010	Plants & Humanity	1.0	C	2.000
FAM 0002	Art, Politics & Culture	1.0	A-	3.667
HIST 0051	History Ancient Rome	1.0	B	3.000
PS 0134	Comp Politics Mid East	1.0	B-	2.667
	GPA	Attempted	Earned	GPA Units
Term	2.80	5.00	5.0	14.00
Cumulative	2.78	10.00	12.0	25.00

Fall Term 2011

College of Liberal Arts					
Major - International Relations					
Course	Description	Earned	Grade	Points	
ARB 0004	Intermed Std Arabic II	1.0	C	2.000	
EC 0060	International Econ	1.0	B-	2.667	
HIST 0029	Us For Relat Since 1900	1.0	B-	2.667	
PS 0176	Migration/refugeeschiz	1.0	B-	2.667	
Term	GPA	Attempted	Earned	GPA Units	Points
Cumulative	2.76	19.00	21.0	18.00	49.67

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JoAnn Jack
Registrar, Arts, Sciences & Engineering

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Arts, Sciences, & Engineering
Dowling Hall
Medford, MA 02155

TUFTS UNIVERSITY Academic Record

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Name: Sarah C. Butterfield
Student ID: 1105442 Birthdate: 06/26/###

College of Liberal Arts

Print Date: 07/20/2017

Page 3 of 3

Fall Term 2013

Course	Description	Earned	Grade	Points
ARB 0121	Advanced Modern Standard Arabic	1.0	B-	2.667
EXP 0091	Experimental College	1.0	A-	3.667
HIST 0012	Epic Science And Technology In World History	1.0	B-	2.667
MATH 0019	The Mathematics Of Social Choice	1.0	B+	3.333
PS 0172	U.S. Foreign Policy In The Middle East	1.0	A-	3.667
Term	GPA	Attempted	Earned	GPA Units
	3.20	5.00	5.0	5.00
Cumulative	2.86	24.00	34.0	23.00
				16.00
				65.67

Spring Term 2014

Course	Description	Earned	Grade	Points	
ARB 0122	Advanced Modern Standard Arabic	1.0	B	3.000	
EXP 0091	Experimental College EPIC: Future of MENA,	1.0	A-	3.667	
FAH 0092	Special Topics Modern Art US 1893-1962	1.0	B+	3.333	
PS 0184	Better Than the Truth: Fabricated and False Facts in International Politics	1.0	B	3.000	
PS 0188	Topics In International Relations Intelligence & Nat'l Security	1.0	B+	3.333	
Term	GPA	Attempted	Earned	GPA Units	Points
	3.27	5.00	5.0	5.00	16.33
Cumulative	2.93	29.00	38.0	28.00	82.00

AS&E Undergrad Career Totals	2.93	39.00	39.0	28.00	82.00
Comb Cum GPA					
Totals					

End of College of Liberal Arts

This officially sealed and signed transcript is printed on blue SCRIP-SAFE security paper with the name of the university printed in white type across the face of the document. A raised seal is not required. The institution name and the word COPY appear as a latent image. Reject document if seal to the right is distorted.

JoAnn Jack
Registrar, Arts, Sciences & Engineering

JOAN JACK, REGISTRAR, ARTS, SCIENCES & ENGINEERING

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June 14, 2021

RE: Sarah Butterfield, NYU Law '22

Dear Judge:

I am the Legal Director of the Center for Constitutional Rights, where I supervise our work related to racial justice, prisoners' rights, immigrants' rights, LGBTQI+ rights, and rights of Guantanamo detainees and victims of torture. Prior to this position, I was a tenured law professor at Seton Hall Law School, where I taught Constitutional Law for ten years and directed a Constitutional Law Clinic and I am an Adjunct Professor at NYU and Yale Law Schools, where I teach Civil Rights Law. I write to enthusiastically recommend Sarah Butterfield for a clerkship in your chambers.

Sarah was a student in a three-credit Civil Rights Law course I taught at NYU in the Fall 2020 – a doctrinal course covering theory and practice of Section 1983, *Bivens*, immunities and defenses for state, municipal and federal actors, modes of liability under *Monell*, other Reconstruction-era civil rights statutes (1981, 1982, 1985(3)), modern civil rights statutes (Title VII, FHA) and standing and damages. The course was quite intensive, leading half the student evaluations to recommend it be taught as a four credit class. Sarah received a high A, writing an excellent exam.

The class was taught in a hybrid form, and I got to know Sarah well because she was one of three students (out of 40) who came to class in-person every time. That fact alone shouldn't necessarily preference Sarah over other students less comfortable with travel or who were in other locations, of course, but I mention it because to me it otherwise speaks to how committed and interested Sarah is in her learning and self-improvement. When on call, she was flawlessly prepared on complex material (a pattern and practice Title VII case which included a thorny 1981 qualified immunity dimension for an individual defendant, and the failure to train theory of *Monell* liability); she walked through every question and answer as if she was reading my mind, instead of the obvious, true explanation attributable to her deep and careful reading. She asked very probing questions (for example, why in some circumstances is a *Monell* defendant an individual policymaker (e.g., *Connick v. Thompson*) while in others it is the municipality (e.g. *City of Canton*) – a question that gets deeply at the underlying logic (or illogic?) of the often formalistic pleading materials – and she volunteered answers more than any other student in the class.

Sarah Butterfield, NYU Law '22
June 14, 2021
Page 2

We spoke frequently before and after class, typically about the course material, but also about my own litigation projects and her research assistance for visionary Professor Meg Satterthwaite around international human rights law. She was extremely hungry to learn about everything in front of her, from my own early work challenging indefinite detention in Guantanamo and my organization's international human rights work. She shared her open thinking as she was trying to identify whether bringing novel claims in the Inter-American Commission for Human Rights on behalf of Prof. Satterthwaite's clients would be a viable strategy. She impressed me as grounded, eager and dare I say in the best possible way, earnest about her education and ultimately, her practice – which she very much wants to be in the public interest sphere, particularly working in the immigrants' rights and refugee rights spaces. If last year weren't hard enough for law students, I think Sarah came with an additional uncertainty in that she transferred to NYU from George Washington which I sense added an extra anxiety in her first NYU semester about her belonging. I feel proud for her to say she did so well in my class and in other classes which I attribute to her ability to focus and trust in the value of commitment and hard work.

I have recommended many students for federal clerkships and think Sarah will make an excellent clerk. First, she is doing it for the right reasons: she wants to continue to learn expansively about legal process and substantive legal doctrines; she wants to strengthen the quality and speed of her writing; she wants to see law operating in three-dimensional world of the courtroom and chambers; and is eager for any additional mentorship a clerkship can provide. She wants to be an excellent legal practitioner, for her own sense of integrity and in service of vulnerable clients, and knows she still has much to learn. She is an extremely hard worker, is conscientious and humble and holds herself to very high standards. On an interpersonal level, she is thoughtful, mature, level-headed and also extremely kind and respectful (consistent with her humility and desire to learn). She would make a very positive presence in your chambers. I urge you to give her very strong consideration.

Very truly yours,

/s/ Baher Azmy

Baher Azmy



June 14, 2021

RE: Sarah Butterfield, NYU Law '22

Your Honor:

It is my pleasure to write this letter of recommendation on behalf of Sarah Butterfield.

Sarah was one of forty-five students in my 1L Fundamentals of Lawyering class. The course, taught in small sections of fifteen students each, is a year-long, six-credit class that combines argumentation, writing and research with other core professional development skills. Before teaching, I was a litigator in private practice for 20 years, and was the managing partner of the DC offices of two nationwide AmLaw firms. Before that, I clerked for judges on the United States District Court and Court of Appeals. It is with the combined perspective of these experiences that I recommend Sarah with the utmost enthusiasm.

There is something special about Sarah. She has a rare mix of analytical firepower, passion, genuineness and an endearingly skeptical sense of humor. As a result, she was, in my experience, a “once-in-many-years” student whose intellectual talents pair with an ability to make unusually meaningful personal and professional connections.

Sarah came to law school after having spent five years in the Middle East working directly with refugees and individuals seeking asylum. She then brought every bit of that passion and dedication to law school. I distinctly recall the time early in the year when, after sitting down to go over my comments on an assignment, she thanked me and said, “I just want to be great at this.”

In class, she was always prepared, engaged, and respectful of her classmates. Her writing was crisp and mature, and her research was always thorough. In fact, over the course of the year, the quality of her writing and legal analysis grew so strong that she became one of the very best in her class. She was also a frequent attendee at my office hours where she would ask me to critique her written work at an uncommon, though very welcome, level of rigor. We also spent considerable time throughout the year just chatting about her law school experience, her career goals, and life in general. Over this past year, we have remained in touch and have continued some of those same conversations, though remotely, as her legal career path has begun to take shape. Entirely to Sarah’s credit, it has been the type of relationship that makes teaching and mentoring so rewarding.

Sarah Butterfield, NYU Law '22
June 14, 2021
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Through one of the NYU clinics, Sarah recently appeared in court for the first time and examined an expert witness. She wrote to me afterward that, “it went well, I think. . . . Don’t quote me on this, but I might really enjoy being in court!!” Knowing the exceptional quality of Sarah’s work, I’m sure it did go well. And no matter how old I get, I will always find that type of enthusiasm contagious.

Sincerely,

/s/ Michael B. DeSanctis

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June 14, 2021

RE: Sarah Butterfield, NYU Law '22

Your Honor:

I am happy to submit this letter recommending Sarah Butterfield for a clerkship in your chambers. I believe Ms. Butterfield is an outstanding candidate: she has excellent research and writing skills, works incredibly hard, and has unusually solid judgment. I am confident she would excel as a law clerk.

I have come to know Ms. Butterfield quite well over the past year through her work conducting research for me. Ms. Butterfield distinguished herself when she applied for a position as a Human Rights Scholar at the Center for Human Rights and Global Justice, where I am a faculty co-director. Ms. Butterfield stood out as an especially strong applicant based both on her extremely strong transcript and grades, and because she had experience doing applied human rights work in Cairo before law school. When we selected her as a Scholar, I was eager to work with her.

As a clinical law professor, I need to constantly juggle clinical casework and my own research and writing. Ms. Butterfield worked on a number of widely differing assignments for me, and each time, she turned in work that was far beyond what I expected. For example, when a clinic team was overwhelmed with a challenging brief in a major case, I asked Ms. Butterfield to conduct some supporting research on the caselaw relied upon in a brief produced by another organization in a similar case. Ms. Butterfield developed a beautifully written, well-structured document summarizing the major cases, their holdings, and the reasoning relevant to the work my student team was doing to develop their theory of our case. Ms. Butterfield's work was careful and thorough; her writing was clear; and her work was always on time. I was very impressed with her skills, and every time I needed a quick and accurate answer to a difficult question this past year, I would ask Ms. Butterfield to take on the assignment. She never disappointed.

Ms. Butterfield's outstanding work was produced during a year when she was also serving as a staff editor on the *Review of Law and Social Change* and devoting significant time to service projects. Her ability to work on multiple projects with demanding deadlines was proven to me several times over. While this combination of work ethic, organizational capacity, and leadership may not be unique in law students, Ms. Butterfield also brings a depth of reflection and strong judgment that is rare in my experience. I have been struck by this several times over the past year, when Ms. Butterfield took the initiative to make connections between

Sarah Butterfield, NYU Law '22
June 14, 2021
Page 2

important issues, calling my attention to discussions and debates in fields adjacent to those where my expertise lies.

I was delighted recently to receive an email with the subject line “Your RA Sarah Butterfield.” In the note, a colleague at the Center for Human Rights and Global Justice explained that Ms. Butterfield responded to a recent all-Center query she sent out seeking assistance with analyzing a data set. Ms. Butterfield responded quickly, transforming some microdata into a format usable for my colleague’s team. “There’s no purpose to my outreach,” the colleague wrote, “other than my feeling grateful and wanting to ensure the people supervising her were aware of her contribution and generosity.”

Ms. Butterfield’s work history demonstrates her capacity to thrive in high-pressure environments. Notably, she worked in Cairo before law school, managing resettlement assistance for Syrian refugees. To call this work demanding likely diminishes its stressful nature. Ms. Butterfield credits her time in Cairo for advancing her commitment to refugee and immigration law.

Although my work with Ms. Butterfield took place online due to the pandemic, her warmth, clarity in communication, and easy demeanor shone through. I believe she would be a real asset as a law clerk. Her poise, professionalism, and judgment make her worthy of high levels of trust. For all of these reasons, I recommend her enthusiastically.

Please do not hesitate to contact me, as I would be very happy to answer any questions you might have.

Sincerely,



Margaret Satterthwaite

To Whom It May Concern:

The following writing sample is a sample appellate brief – the product of an assignment for my 1L Lawyering course. It concerned a fictional problem and set of facts wherein a bank attempted to remove a previously-commissioned sculpture from their lobby, and the artist’s subsequent claim that it must remain displayed, per the Visual Artists’ Rights Act (discussed in greater detail herein).

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

FLEUR

Plaintiff-Appellee,

v.

PEACH TREE BANK

Defendant-Appellant.

**On Appeal From The United States District Court
For The Northern District Of Georgia**

BRIEF OF APPELLEE

FLEUR

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STATEMENT OF ISSUES

1. Whether the District Court properly found that Eco Echo is not a work for hire where the contractor was hired for a one-time project, was paid a one-time fee, and produced a skilled and unique final product.
2. Whether the District Court properly found Eco Echo is a work of recognized stature where such work was lauded by critics and the subject of significant public popularity.
3. Whether the District Court properly exercised its discretion when it found maintaining Eco Echo both outweighs any burdens to Peach Tree Bank in doing so and is in the public interest.

STATEMENT OF THE CASE

Since she was a mere 12-years-old, Fleur, a celebrated Belgian-born artist, has been making waves in the fields of art and activism. She has been referred to as an “internationally renowned graphic artist”, R. at 33, “the most exciting eco-artist of our generation”, R. at 30, “one to watch”, *id.*, and “poised to become the toast of the art world”, R. at 26.

In recent years, Fleur has skyrocketed to the international stage, producing poetry and large-scale street murals for the public and using her platform as an environmental activist to fight for climate change reform worldwide. Though this has sometimes led her into controversy, including her arrest while participating in a peaceful protest, this is only further demonstrative of Fleur’s role as a leader of progressive thought and the longstanding American tradition of civil disobedience. R. at 29.

Fleur first “captured the world’s attention” when she wrote a prolific poem about mother earth, which she read at the Climate Change Conference in Quebec, after which she appeared on the cover of TIME magazine and was transformed into a global “icon”. R. at 26. After spending

time learning from other street and graffiti artists, Fleur created the widely acclaimed “raw and exquisite” *Disappearing Britain* triptych in 2016, and in 2017, another triptych which received global media attention, *A Climate of Change*. R. at 19, 27.

As a result of Fleur’s strong associations with environmental activism, Peach Tree Bank (“PTB”) in Atlanta, Georgia sought out her artistic talent to complement its ‘going green’ initiative by having Fleur create a work of environmental art to display in their lobby. R. at 21.

PTB contracted Fleur for a one-time job to make yet another triptych in her “signature style” for a single flat fee. R. at 7. Per the parties’ contract, the theme of the work was explicitly stated to be environmental protection and advocacy, no doubt due not only to PTB’s awareness of Fleur’s environmental activist legacy, but in fact due to their desire to *promote* that environmentalism in their programming. *Id.*

Since its initial debut in PTB’s lobby, Eco Echo has been the subject of substantial discourse, including both widespread acclaim from art critics and popularity from the general public. Activist and writer of website “Eco-Art” wrote that “[n]ot since Frank Lloyd Wright built Taliesin has there been a piece that so moves Organic Architecture.” R. at 19. Other media outlets have referred to “one of her iconic triptychs” as the “coolest “of the moment” environmental art exhibit”, R. at 30, while one art curator referred to the piece as destination art which “inspires one to travel to see it” due to how “it’s so compelling in its presentation.” R. at 31.

Even Eco Echo’s critics cannot help but shower praise upon the piece’s popularity among the masses. Senior curator from MOCA admitted, “Fleur has become an icon” and noted that he found there to be value “in the textured hair of the figure at its center”, admitting “that alone is worth a front-seat view”. R. at 32. PTB themselves reiterated their happiness at how “Eco Echo

has become so popular so quickly.” R. at 33. By June 1st, the related hashtag “#ecoecho” had 100,000 followers on Instagram. R. at 27.

With the onset of Eco Echo’s popularity, PTB now claims that they were unprepared for the large influx of crowds that have resulted due to so many visitors coming to view it. Far from bands of radical activists, PTB’s lobby has seemingly been visited by tourists and eager young fans. Though one incident of unrest did occur, according to a PTB employee, it began when a teenage daughter of one family of tourists tripped another young boy. R. at 23.

Now, PTB seeks to remove Eco Echo from their lobby (which cannot be done without destroying the work in its entirety), R. at 19, claiming that its strong environmental advocacy has caused unrest on their premises.

STANDARD OF REVIEW

Excerpted for brevity.

SUMMARY OF THE ARGUMENT

Excerpted for brevity.

ARGUMENT

In order to succeed on her motion for a preliminary injunction, Fleur must prove that (1) she is likely to succeed on the merits of her VARA claim at trial; (2) to grant such is in the public interest; (3) she faces an immediate threat of irreparable harm; and (4) her potential injury outweighs the burden to PTB of being forced to keep Eco Echo up in their lobby. *McDonald’s Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). As the District Court properly held, Fleur met her burden of proof on all four of the above requirements and succeeded on the motion. The District Court properly exercised its discretion in finding that Fleur met these requirements, because Eco Echo is not a work for hire, it is a work of recognized stature, the burden to Fleur of

Eco Echo's destruction is much greater than the burden to PTB to maintain it, and its preservation is in the public interest. Therefore, the motion for a preliminary injunction should be affirmed.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT FLEUR IS LIKELY TO SUCCEED ON THE MERITS AT TRIAL BECAUSE ECO ECHO IS A NOT WORK FOR HIRE AND IS A WORK OF RECOGNIZED STATURE.

The Visual Artist's Right's Act ("VARA") is a broad statute passed by Congress in 1990, in order to expand protections for artists beyond their economic rights by adding additional protections for their moral rights and "safeguard the Nation's artistic heritage". 135 Cong. Rec. S6810, 6811 (1989). The basic purpose of the statute's passage was, in the words of one Congressman, "[T]o commit...to the fundamental premise that even when an artist has sold his work he has the moral and legal right to see the integrity of that work preserved." *Id.* at 6813.

When VARA was passed, its goal was not only to protect the Picasso's and Monet's of this world, but rather to serve a much broader purpose to preserve for the public "an accurate account of the culture of our time." H.R. REP 101-514 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6916.

The section of VARA at issue in this case, § (a)(3)(B) states, in relevant part, "Subject to section 107 and independent of the exclusive rights provided in section 106, the author of *a work of visual art* ... subject to the limitations set forth in section 113(d), shall have the right ... to prevent *any destruction of a work of recognized stature*, and any intentional or grossly negligent destruction of that work is a violation of that right." 17 U.S.C. § 106 (A) (2018) (emphasis added). PTB's attempt to destroy Eco Echo, a work of recognized stature, by removing it from its lobby,

is an unlawful violation of VARA that will cause Fleur irreparable harm. The District Court's finding of such should accordingly be affirmed.

A. Eco Echo Is Not A Work For Hire And Therefore Is A Work Of Visual Art

Actionable Under VARA Because The Contractor Was Hired For A One-Time Project, Was Paid A One-Time Fee, And Produced A Skilled And Unique Final Product.

At the District Court, Fleur successfully demonstrated that Eco Echo is a protected work of visual art and not a work for hire, because she was not acting as an employee in the course of her employment; she was a one-time contractor paid by PTB to create a single work of art.

A “work of visual art” is any “painting, drawing, print, or sculpture, existing in a single copy”. 17 U.S.C. § 101 (2018). This definition clearly includes a one-of-a-kind sculpture such as Eco Echo.

One of the exceptions within the statute's definition of a work of visual art are “works for hire”. *Id.* In order for a work to be one made for hire, it must be one “prepared by an employee within the scope of his or her employment.” *Id.* The Supreme Court has looked at such work for hire cases and determined that whether an individual was an employee working in their scope of employment is determined by a 13-factor balancing test. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (determining that a balancing test is necessary in copyright inquiries to assess whether a party was an employee or independent contractor). However, over time this test has evolved, and Circuit Courts of Appeals have adapted the test to focus on the most significant factors in the analysis – (1) the right to control the manner and means of production; (2) requisite skill; (3) provision of benefits; (4) tax treatment; and (5) additional projects – and from such, make

a cumulative assessment. *E.g.*, *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85 (2d Cir. 1995); *Marco v. Accent Pub. Co., Inc.*, 969 F.2d 1547, 1549 (3d Cir. 1992).

Manner and means of production. Though no single work-for-hire factor is dispositive, courts agree that the hiring party’s control over the work’s production is the “principal guidepost” for the entire inquiry. *Quinlan v. Secretary, U.S. Dept. of Labor*, 812 F.3d 832, 837 (11th Cir. 2016) (finding that the parties were employees based in significant part on the fact that their employer “had every indicia of control over” their work). In short, “the more detailed the supervision and the stricter the enforcement standards, the greater the likelihood of an employer-employee relationship, and conversely.” *Lorenz Schneider Co., Inc. v. N.L.R.B.*, 517 F.2d 445, 451 (2d Cir. 1975) (finding that a business operating through a franchise system did not consist of an employer-employee relationship primarily because, although standard procedures were overseen and enforced, there was no “day-to-day” supervision of the individual franchise).

The District Court properly exercised its discretion that this factor favors Fleur, as she had primary control over all creative components in Eco Echo’s creation. Eco Echo was firstly in Fleur’s “signature style” of a three-part triptych, and, as the contract provides, was to include Fleur’s own “selection of text and imagery”. R. at 6. When Fleur was first in touch with PTB’s Chief Culture Officer, Bryan Bancroft, she reminded him, “I know [the graphics are] up to me,” to which Bancroft responded that they were going to “just let [Fleur] create.” R. at 10. Fleur sent Bancroft a copy of her initial design, and though he did have a question about the meaning of the work, he quickly withdrew when he realized, quite clearly, he did not understand the artistic message Fleur sought to convey, stating “OK, I guess it’s consistent with what we asked for. Seems harmless in any event.” R. at 11. Bancroft’s quick recusal from any role in Eco Echo’s display or underlying message is emblematic of Fleur’s overall control over the entire work’s manner and

means of production. In the rare instances in which Fleur consulted with PTB on the project, such consultations were purely logistical and not related to her creation of Eco Echo itself. R. at 9. Given the minimal level of control and supervision PTB retained over Eco Echo's creation, this factor favors Fleur.

Requisite Skill. Whether a party may succeed on this factor is an inexact inquiry, as the court generally does not make determinations as to the extent of an artist's skill. In general, courts have consistently held that artists are, by nature, "highly skilled occupations." *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 318 (S.D.N.Y. 1994) (finding the sculpture in question constituted the requisite level of skill, wherein the sculptors "conceived the design, created the artwork, and executed the construction thereof"). The same is all true of Fleur's creation of Eco Echo – she created the design, painted it, and executed its construction in PTB's lobby, all of which required a high level of skill. As expert witness Dr. Sylvia Hook testified at the District Court, Fleur used "edgy and novel" techniques in Eco Echo's design and creation, which further emphasize this point. R. at 4. Thusly, Fleur prevails on this second factor due to her unique skill as an artist.

Provision of benefits. This factor, and the two remaining, are all straightforward. Fleur did not receive any benefits due to her relationship with PTB. She received only a flat fee, paid in installments, and reimbursement for materials. R. at 7. Though the contract does refer to Fleur as an "employee", it also refers to PTB as the "client" rather than an employer, which is more closely aligned with Fleur's status as an independent contractor. *Id.* Regardless, as both the District Court and *Carter* – the preeminent case on VARA work-for-hire – point out, the contract's use of the term "employee" "does not transform [it] into [a] "magic word" imbued with legally controlling significance." *Carter*, 71 F.3d at 87.

Tax treatment. Again, Fleur clearly prevails on this factor. Fleur did not receive a continuous salary for her work, she did not agree, nor was she asked, to work a set schedule of hours, and although PTB withheld taxes from her payment, this is required by law, so it does not provide any evidence of Fleur’s alleged status as an employee. R. at 4.

Additional projects. In general, employees carry out ongoing work at the discretion of their employer, whereas “when a hired party is hired to complete or achieve a *specific* task, it is more likely that the hired party is an independent contractor.” *Carter*, 861 F. Supp. at 319 (emphasis added). This factor thus favors Fleur, as she did not perform any additional work for PTB beyond the agreed-upon installation of Eco Echo. *Id.*

**B. Eco Echo Is A Work Of Recognized Stature Because Such Work Was Lauded
By Critics And The Subject Of Significant Public Popularity.**

Excerpted for brevity.

**II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING
THAT THE DAMAGE THAT DESTRUCTION OF ECO ECHO WILL CAUSE
TO FLEUR FAR OUTWEIGHS THE BURDEN TO PTB OF KEEPING ECO
ECHO IN ITS LOBBY.**

Excerpted for brevity.

**III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING
THAT KEEPING ECO ECHO IN PTB’S LOBBY IS IN THE PUBLIC
INTEREST BECAUSE IT PRESERVES CULTURE.**

Excerpted for brevity.

CONCLUSION

For all of the reasons stated above, Appellee Fleur requests that the Court affirm the District Court's preliminary injunction.

Applicant Details

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Last Name	Carroll
Citizenship Status	U. S. Citizen
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Contact Phone Number	3175297900

Applicant Education

BA/BS From	Pomona College
Date of BA/BS	May 2017
JD/LLB From	The George Washington University Law School
	https://www.law.gwu.edu/
Date of JD/LLB	May 15, 2022
Class Rank	5%
Law Review/Journal	Yes
Journal(s)	George Washington Law Review
Moot Court Experience	No

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships	Yes
--------------------------------------	------------

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

BEN CARROLL

1101 New Hampshire Ave NW #1021, Washington D.C. 20037 | (317) 529-7900 | blcarroll@gwu.edu

April 18, 2022

The Honorable Lewis J. Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007

Dear Judge Liman:

I am a third-year law student at the George Washington University Law School. I write to apply for a clerkship in your chambers starting in August 2024, after I have worked at the New York office of Quinn Emanuel Urquhart & Sullivan, LLP.

Enclosed please find my resume, writing sample, law school transcript, undergraduate transcript, and letters of recommendation from the following people:

Jennifer Wimsatt Pusateri
Professor, George Washington University Law School
jpusateri@law.gwu.edu
(202) 994-1550

The Honorable Russell F. Canan
Senior Judge, District of Columbia Superior Court
russellcanan@gmail.com
(202) 841-9902

Thomas Colby
Associate Dean & Professor, George Washington University Law School
tcolby@law.gwu.edu
(202) 994-0176

Please let me know if I can provide any additional information. I can be reached by phone at (317) 529-7900 or by email at blcarroll@gwu.edu. Thank you for your consideration of my candidacy. I hope to have the opportunity to interview with you.

Respectfully,
Ben Carroll

BEN CARROLL

1101 New Hampshire Ave NW #1021, Washington D.C. 20037 | (317) 529-7900 | blcarroll@gwu.edu

EDUCATION

The George Washington University Law School, Washington, D.C.

J.D., expected May 2022; GPA 3.96

Honors: George Washington Scholar (top 1–15% of class to date), Merit scholarship recipient

Activities: *The George Washington Law Review*, Notes Editor; *Criminal Law Brief*, Moderator; GW Law Soccer, President

Pomona College, Claremont, Ca.

B.A., Geology, May 2017

Honors: One of two campus-wide writing awards for published essay on Plato's *Meno* and the nature of virtue

Thesis: Wrote senior thesis on the growth of a developing Southern California mountain range

Study abroad: Research-based semester in New Zealand (8-week field camp and independent research project); presented and defended research at Geologic Society of America conference in Denver (September 2016)

EXPERIENCE

Incoming Associate, Quinn Emanuel Urquhart & Sullivan, LLP, New York, N.Y. | Starting Fall 2022

Summer Associate, Quinn Emanuel Urquhart & Sullivan, LLP, New York, N.Y. | May 2021 – August 2021

- Drafted motions, oppositions, replies, and research memoranda, and participated in mock trial program
- Worked on cases involving constitutional law, securities fraud, trade secret, and international arbitration

Dean's Fellow (TA) for Professor Pusateri, G.W.U. Law School, Washington, D.C. | August 2020 – May 2022

- Teaching part of 1L legal writing curriculum alongside professor, focusing on citation, editing, and practical skills

Legal Intern, Washington Legal Clinic for the Homeless, Washington, D.C. | January 2021 – April 2021

- Researched legal and factual issues and analyzed legislation to advocate for homeless persons

Judicial Intern, U.S. District Court for the District of Columbia, Washington, D.C. | August 2020 – October 2020

- Conducted legal research and drafted orders with law clerks and Magistrate Judge G. Michael Harvey
- Worked on cases involving class action injunctions, attorney's fee shifting, and ethical violations

Judicial Intern, District of Columbia Superior Court, Washington, D.C. | May 2020 – July 2020

- Conducted legal research, drafted orders, and wrote bench memos with law clerks and Judge William M. Jackson

Lead Teacher, Success Academy Charter Schools, New York, N.Y. | July 2018 – July 2019

- Taught middle school science at Harlem Northwest, member of a successful school network that educates NYC's underserved minorities with results that exceed all New York state school districts
- Prepared 75 fifth graders to achieve best-in-network results on final exam (100% A's and B's)
- Assumed responsibility for the safety and education of children; served as first contact for fourteen student families

Research Analyst, Equilar, Inc., Redwood City, Ca. | June 2017 – June 2018

INTERESTS

Wilderness Explorer: Solo backpacked in 17 national parks; Led crews into California and New Mexico mountain wilderness

Creative Writing: Completed novella during National Novel Writing Month

Boy Scouts of America: Achieved rank of Eagle Scout, granted by Crossroads of America Council in February 2011

Soccer Enthusiast: Starting forward on DC adult league city champion, Learned Foot soccer team

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WASHINGTON, DC 20052

TELEPHONE: 202-994-4900

Official Academic Transcript of:
BENJAMIN L CARROLL
Transcript Created: 20-Jan-2022

Requested by:
BENJAMIN L CARROLL
1101 NEW HAMPSHIRE AVE NW, APT 1021
WASHINGTON, DC 20037-1505

E-Mail: blcarroll@law.gwu.edu



Document Type: THIRD-PARTY SECURE PDF

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1101 NEW HAMPSHIRE AVE NW APT 1021
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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

Gwid : G25711496

Date of Birth: 30-OCT

Date Issued: 20-JAN-2022

Record of: Benjamin L Carroll

Page: 1

Student Level: Law
Admit Term: Fall 2019Issued To: BENJAMIN CARROLL
1101 NEW HAMPSHIRE AVE NW APT 1021
WASHINGTON, DC 20037-1505

REFNUM:66683977

Current College(s): Law School
Current Major(s): Law

SUBJ NO COURSE TITLE CRDT GRD PTS

GEORGE WASHINGTON UNIVERSITY CREDIT:

Fall 2019

Law School
Law

LAW	6202	Contracts Swaine	4.00	A
LAW	6206	Torts Suter	4.00	A+
LAW	6212	Civil Procedure Colby	4.00	A
LAW	6216	Fundamentals Of Lawyering I Pusateri	3.00	A-
Ehrs 15.00 GPA-Hrs 15.00 GPA 4.022				
CUM 15.00 GPA-Hrs 15.00 GPA 4.022				
GEORGE WASHINGTON SCHOLAR				
TOP 1% - 15% OF THE CLASS TO DATE				

Spring 2020

Law School
Law

LAW	6208	Property Tuttle	4.00	CR
LAW	6209	Legislation And Regulation Schaffner	3.00	CR
LAW	6210	Criminal Law Weisburd	3.00	CR
LAW	6214	Constitutional Law I Morrison	3.00	CR
LAW	6217	Fundamentals Of Lawyering II Pusateri	3.00	CR
Ehrs 16.00 GPA-Hrs 0.00 GPA 0.000				
CUM 31.00 GPA-Hrs 15.00 GPA 4.022				
Good Standing				
...				

DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION. ALL LAW SCHOOL COURSES FOR SPRING 2020 SEMESTER WERE GRADED ON A MANDATORY CREDIT/NO-CREDIT BASIS.

DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT

***** CONTINUED ON NEXT COLUMN *****

SUBJ NO COURSE TITLE CRDT GRD PTS

Fall 2020

Law School
Law

LAW	6250	Corporations Manns	4.00	A
LAW	6438	Energy Law And Regulation Solomon	2.00	A-
LAW	6666	Research And Writing Fellow Gambert	2.00	CR
LAW	6668	Field Placement	2.00	CR
LAW	6669	Judicial Lawyering Canan	2.00	A
Ehrs 12.00 GPA-Hrs 8.00 GPA 3.917				
CUM 43.00 GPA-Hrs 23.00 GPA 3.986				
Good Standing				
GEORGE WASHINGTON SCHOLAR				
TOP 1% - 15% OF THE CLASS TO DATE				

Spring 2021

LAW	6351	Reading Group Hammond	1.00	CR
LAW	6379 <td>Criminal Law/Procedure Seminar Canan</td> <td>2.00</td> <td>A</td>	Criminal Law/Procedure Seminar Canan	2.00	A
LAW	6380 <td>Constitutional Law II Colby</td> <td>4.00</td> <td>A</td>	Constitutional Law II Colby	4.00	A
LAW	6470 <td>Intellectual Property Karshtedt</td> <td>3.00</td> <td>A</td>	Intellectual Property Karshtedt	3.00	A
LAW	6666 <td>Research And Writing Fellow Gambert</td> <td>2.00</td> <td>CR</td>	Research And Writing Fellow Gambert	2.00	CR
LAW	6667 <td>Advanced Field Placement Colangelo</td> <td>0.00</td> <td>CR</td>	Advanced Field Placement Colangelo	0.00	CR
LAW	6668 <td>Field Placement Tillipman</td> <td>2.00</td> <td>CR</td>	Field Placement Tillipman	2.00	CR
Ehrs 14.00 GPA-Hrs 9.00 GPA 4.000				
CUM 57.00 GPA-Hrs 32.00 GPA 3.990				
Good Standing				
GEORGE WASHINGTON SCHOLAR				
TOP 1% - 15% OF THE CLASS TO DATE				

***** CONTINUED ON PAGE 2 *****



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University Registrar

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WASHINGTON, DC

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Gwid : G25711496

Date of Birth: 30-OCT

Date Issued: 20-JAN-2022

Record of: Benjamin L Carroll

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS

Fall 2021				
LAW 6218	Prof Responsibility & Ethics	2.00	A	
LAW 6230	Evidence	4.00	A	
LAW 6238	Remedies	3.00	A	
LAW 6399	Constitutional Law Seminar	2.00	B+	
LAW 6400	Administrative Law	3.00	A	
Ehrs	14.00	GPA-Hrs	14.00	GPA 3.905
CUM	71.00	GPA-Hrs	46.00	GPA 3.964
Good Standing				
Fall 2020				
Law School				
Law				
LAW 6657	Law Review Note	1.00	-----	
Credits In Progress:		1.00		
Spring 2021				
LAW 6657	Law Review Note	1.00	-----	
Credits In Progress:		1.00		
Fall 2021				
LAW 6658	Law Review	1.00	-----	
Credits In Progress:		1.00		
Spring 2022				
LAW 6232	Federal Courts	4.00	-----	
LAW 6360	Criminal Procedure	4.00	-----	
LAW 6422	Local Government Law	2.00	-----	
LAW 6658	Law Review	1.00	-----	
LAW 6666	Research And Writing Fellow	2.00	-----	
Credits In Progress:		13.00		
***** TRANSCRIPT TOTALS *****				
Earned Hrs GPA Hrs Points GPA				
TOTAL INSTITUTION	71.00	46.00	182.33	3.964
OVERALL	71.00	46.00	182.33	3.964
##### END OF DOCUMENT #####				



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University Registrar

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DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and

School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit <http://go.gwu.edu/corcorantranscriptkey>

THE CONSORTIUM OF UNIVERSITIES OF
THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
CU	Catholic University of America	NVCC	Northern Virginia Community College
GC	Gallaudet University	PGCC	Prince George's Community College
GU	Georgetown University	SEU	Southeastern University
GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; B, Good; C, Satisfactory; D, Low Pass; F, Fail; I, Incomplete; IPG, In Progress; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; P, Pass; NP, No Pass; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the I is replaced by the final grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.

Effective Fall 2003: The grading symbol R indicates need to repeat course.

Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I/ and the grade.

Effective Fall 1987: The following grading symbols were added: A-, B+, B-, C+, C-, D+, D-.

Effective Summer 1980: The grading symbols: P, Pass, and NP, No Pass, replace CR, Credit, and NC, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) A, Excellent; B, Good; C, Minimum Pass; F, Failure; I, Incomplete; IPG, In Progress; CR, Credit; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 1994: The following grading symbols were added: A-, B+, B-, C+, C- grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; B+, B, B-, Good; C+, C, C-, Passing; D, Minimum Pass; F, Failure; CR, Credit; NC, No Credit; I, Incomplete. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

M.D. Program Grading System

H, Honors; HP, High Pass; P, Pass; F, Failure; IP, In Progress; I, Incomplete; CN, Conditional; W, Withdrawal; X, Exempt; CN/P, Conditional converted to Pass; CN/F, Conditional converted to Failure. Through Summer 2014 the I was replaced with I and the final grade.

For historical information not included in the transcript key, please visit

<http://www.gwu.edu/transcriptkey>

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Page &&10262275

Unofficial Transcript
Pomona College

Name: Benjamin Layton Carroll

DOB(MM/DD): 10/30

Sex: M

Class: Graduated

Degree: Bachelor of Arts

Degree Date: 05/14/17

Major(s): Geology

Student ID: 10262275

Curr Enr Stat: Graduated

Academic Stat: Good standing

Plan Grad Sess/Yr: Spring Term 2017

Advisor: Lackey, Jade-Star

Printed 12/23/20

=====					=====				
-----					DANC152	PO	Hip-Hop Dance	0.50	A
----- Allowed Transfer Credits -----					GEOL020A	PO	Intro to Geology: Geohazards	1.00	B+
Transfer Total from Advanced Placement Exam Credit					HIST012	PO	Saints and Society	1.00	A
AWARDED: 2.00					SPAN033	PO	Intermediate Spanish	1.00	B+
-----					-----				
Transfer work from AP Exams							EARNED IN GPA GPA POINTS GPA		
CHEM Chemistry 1.00 5					sess		4.50 4.50 46.00 10.222		
ENGLA English Language & Composition 1.00 5					cum		15.50 12.50 132.00 10.560		
ENGLI English Literature & Composition 1.00 5					----- Spring Term 2015 -----				
HISTA American History 1.00 5					GEOL111A	PO	Introduction to GIS	1.00	A
MATHA Mathematics Calculus AB 1.00 5					GEOL123	PO	Neotectonics of SoCal w/Lab	1.00	B
MATHB Mathematics Calculus BC 1.00 5					GEOL125	PO	Earth History with Laboratory	1.00	B
PHYSB Physics B 1.00 5					SPAN013	PO	Spanish Conversation, Advanced	0.25	P
Transfer work from Advanced Placement Exam Credit							EARNED IN GPA GPA POINTS GPA		
AWARDED CREDIT 2.00 CR					sess		3.25 3.00 30.00 10.000		
					cum		18.75 15.50 162.00 10.451		
----- Fall Term 2013 -----					----- Fall Term 2015 -----				
CSCI005	HM	Introduction to Computer Science	1.00	A-	ARCN120	SC	Global Tourism & World Heritage	1.00	A-
CSCI005L	HM	Intro to Computer Science Lab	0.00	X	DANC012	PPO	Beginning Ballet I	0.00	NC
ID 001	PO	Critical Inquiry Seminar	1.00	A	GEOL127	PO	Mineralogy w/Laboratory	1.00	B+
		Philosophies of Education			GEOL185	PO	Structural Geology w/Laboratory	1.00	C+
MATH031H	PO	Honors Topics in Calculus II	1.00	B	MATH032	PO	Calculus III	1.00	B-
PE 021	PO	Yoga - Hatha Method I	0.25	P	PE 037	JP	Rock Climbing	0.25	P
PE 069	PO	Soccer	0.25	P					
PHYS070	PO	Spacetime, Quanta, Entropy w/Lab	1.00	B+			EARNED IN GPA GPA POINTS GPA		
PHYS070	LPO	Lab, Spacetime, Quanta, Entropy	0.00	X			sess 4.25 4.00 36.00 9.000		
							cum 23.00 19.50 198.00 10.153		
		EARNED IN GPA GPA POINTS GPA			----- Spring Term 2016 -----				
sess		4.50 4.00 42.00 10.500			CHRI001		Intro to Microeconomics	1.00	B-
cum		6.50 4.00 42.00 10.500			CHRI002		Geothermal & Ore Exploration	1.00	A-
----- Spring Term 2014 -----					CHRI003		Field-focused Research Methods	0.50	A-
ANTH052	PO	Human Sexuality	1.00	A	CHRI004		Field Geology	0.50	A
HIST041	AF	History of Africa from 1800	1.00	A	CHRI005		Conversation Maori Beginners	1.00	A
PE 007	PO	Triathlon Training	0.25	P			Pomona Study Abroad/New Zealand		
PE 069	PO	Soccer	0.25	P			Christchurch/Frontiers Geology		
PHYS071	PO	Introductory Classical Mechanics	0.50	B			EARNED IN GPA GPA POINTS GPA		
PHYS072	PO	Introduc Electricity & Magnetism	0.50	B			sess 4.00 4.00 42.50 10.625		
SPAN002	PO	Elementary Spanish	1.00	A-			cum 27.00 23.50 240.50 10.234		
					----- Fall Term 2016 -----				
		EARNED IN GPA GPA POINTS GPA			GEOL129	PO	Geophysics with Laboratory	1.00	B
sess		4.50 4.00 44.00 11.000			GEOL183	PO	Sedimentology w/Laboratory	1.00	A
cum		11.00 8.00 86.00 10.750			GEOL192	PO	Senior Project in Geology	0.50	B
----- Fall Term 2014 -----					----- To be continued -----				
ART 125	SC	Sculpture	1.00	B-					
----- To be continued -----									
=====					=====				

Printed on 12/23/2020

Page 10262275

Unofficial Transcript
Pomona College

Name: Benjamin Layton Carroll

Student ID: 10262275

RLST139 PO Benjamin, Levinas, Derrida 1.00 A-

	EARNED	IN GPA	GPA POINTS	GPA
sess	3.50	3.50	36.50	10.428
cum	30.50	27.00	277.00	10.259

----- Spring Term 2017 -----

CSCI040 CM Computing for the Web 1.00 A+

GEOL181 PO Ign&Metamorphic Petrology w/Lab 1.00 B+

GEOL192 PO Senior Project in Geology 0.50 B

Tectonic Geomorphology of the Mecca Hills

MATH058 PO Introduction to Statistics w/Lab 1.00 B

	EARNED	IN GPA	GPA POINTS	GPA
sess	3.50	3.50	35.50	10.142
cum	34.00	30.50	312.50	10.245

Pomona College

Degree: Bachelor of Arts

Awarded: 05/14/2017

Major(s): Geology

=====

The Family Educational Rights and Privacy Act of
1974 prohibits the release of this information
without the student's written consent.

=====

The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

April 18, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write in enthusiastic support of Ben Carroll, who has applied to serve as a law clerk in your chambers. Simply put, Ben is one of the very top students at the George Washington University Law School. He has a deep and powerful intellectual interest in the law, he is smart as a whip, and he has been a joy to teach. He is an intellectual star in the making and he would make a fantastic law clerk.

I first met Ben when he was a student in my Civil Procedure class in the Fall of 2019. The class was taught as a “small section,” which allowed me to get to know each student quite well, both inside and outside of class. Ben was engaged, unfailingly well-prepared, and deeply insightful—a joy to have in class. His pointed questions after class and in office hours made it clear that he understood the material at a deeper, more sophisticated level than his peers. I was therefore not at all surprised to learn that he earned one of only a handful of “A” grades that I awarded on my blind-graded, strictly curved examination.

This past semester, I was thrilled to learn that Ben was enrolled in my Constitutional Law class. He was as strong in that class as he was in Civil Procedure: a classroom star from the first day to the last. And once again, he earned one of only a small number of “A” grades on the exam. He was able to spot arguments and complexities in the law that many seasoned lawyers would miss; and, just as impressively, he was able to explain those complexities in clear, concise, artful prose—a rare combination of gifts that is particularly desirable in a law clerk.

Remarkably, such extraordinary performances are par for the course for Ben. We do not rank our students here, but I am confident that Ben’s GPA of 3.99 places him at or very near the very top of his class of around 500 students. He is the best of the best. And he has been named a George Washington Scholar, the highest general academic distinction that we award at this school (which, as you probably know, is generally ranked as one of the top 25 law schools in the country).

In addition to his academic success, Ben has somehow found the time to excel in a variety of extracurricular activities. He serves on The George Washington Law Review, is a member of both Lambda Law and the American Constitution Society, and is the President of GW Law Soccer. He also starts on the championship winning team in the DC adult soccer league. In addition, he serves as a Dean’s Fellow, teaching legal research and writing to first-year law students. Before law school, he taught middle school in Harlem.

In addition, Ben has already acquired valuable legal experience, having worked as an intern or a summer associate in a major law firm, a legal clinic for the homeless, and the chambers of judges on both the United States District Court for the District of Columbia and the District of Columbia Superior Court.

In addition, on a personal level, Ben is wonderful. He is funny and witty, yet polite and respectful. He is refreshingly modest and down-to-Earth for someone with his credentials, and he would be a joy to have in chambers.

Having had the privilege of clerking myself — for Judge Guido Calabresi and Justice David H. Souter — I have a good sense of what it is that judges are looking for in a law clerk. Ben has it in spades. I recommend him to you without reservation.

Sincerely,

Thomas B. Colby
John Theodore Fey Research Professor of Law

Thomas Colby - tcolby@law.gwu.edu - 202-994-0176

The George Washington University Law School
2000 H St NW
Washington, DC 20052

April 18, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am a Senior Judge on the District of Columbia Superior Court and have served as a Judge on that Court for over twenty-five years. I am also a professor at The George Washington University Law School, and in that capacity I have known Ben Carroll for over a year. During that time he took two of my classes, Judicial Lawyering and Anatomy of a Homicide. I am writing to recommend him for a clerkship because I believe he has the talents and disposition to succeed. I know how important it is to have clerks with great writing and analytical skills as well as a helpful attitude. Ben has all of these and can be a great addition to your chambers.

I grade my classes based on legal writing samples. Each of Ben's papers earned him an A and were among the best in each class. His first paper correctly and concisely analyzed the likely outcome of an actual motion to reconsider pandemic-related issues that a criminal defendant made. Ben's bench memo closely matched the analysis of the bench memo produced in the case. His second paper surveyed the use of post-traumatic stress disorder in the defense of homicide cases. It was a thought-provoking and well-written writing sample.

Beyond excellent writing skills, Ben has a sharp and curious mind. My classes feature guest speakers, and students must submit questions for the guest based on the reading. Ben's questions were consistently insightful. Furthermore, Ben has a genuine curiosity for legal issues and stories. When I met with him recently, we discussed a Supreme Court case that he has been researching for a class taught by a sitting Justice of the U.S. Supreme Court. The depth of Ben's research on the case match the depth of research that I perform to write books; I can say this with confidence because his research actually overlapped with the subject matter of one of my books.

While Ben can perform excellent legal research and writing, he also has a natural tendency to be helpful which will prove useful for your chambers. Ben is also resilient, which proved especially helpful when classes went online during the pandemic. During virtual classes, he volunteered to arrive early, help sort out technology problems, and greet guest speakers. His proactive approach and supportive demeanor will be an asset in a judicial clerkship.

I am happy to recommend Ben for a clerkship and believe he would be a great fit. I would be happy to speak with you should you have any questions. You can reach me at russellcanan@gmail.com or 202-841-9902.

Sincerely,

Russell F. Canan

The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

April 18, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am a professor in the Fundamentals of Lawyering program at the George Washington University Law School, where I teach three sections of first-year students legal analysis, research, and writing, as well as the professional skills necessary to succeed in the legal market. Before becoming a full-time faculty member, I practiced at Williams & Connolly, LLP, while teaching as an adjunct professor. After law school I clerked for the Hon. Eugene Siler on the U.S. Court of Appeals for the Sixth Circuit and the Hon. Amul Thapar on the U.S. District Court for the Eastern District of Kentucky. As a result of these experiences, I have had the opportunity to work with many junior lawyers from a multitude of backgrounds. Without hesitation I can say that Ben Carroll is among the strongest junior lawyers I have seen, and I am confident that he will excel in the judicial setting.

Ben was a student in my class in the 2019-2020 school year. He acted as a Dean's Fellow for one of my 2020-2021 classes and will continue to do so in 2021-2022. Dean's Fellows are selected from among the strongest students to help teach portions of the Fundamentals of Lawyering class and to serve as mentors to 1L students. He is also currently serving as a research assistant for me. Based on my experience with Ben, I can speak to his analytical ability, his written and oral communication, his professionalism, creativity, and social acumen. Ben excels in every one of these categories, and I have no reservations recommending him for even the most challenging judicial clerkships.

Ben first impressed me by coming to office hours beginning the first week of classes. Unlike some students who do this to show off and make themselves known, Ben plainly stated that he wanted to create routines to set himself up for success and that he recognized he had much to gain by forming a relationship with his professors. He has, in turn, instilled these same values in the students he teaches and mentors as a Dean's Fellow in the Fundamentals of Lawyering program. Ben continued to impress me throughout the year, and his work ethic and good judgment are not his only strengths. Ben entered law school as a strong writer and continued to grow in that capacity throughout his 1L year. Although the spring semester was graded pass/fail as a result of the COVID-19 pandemic, Ben's spring semester work was at least as strong as his work in the fall. He is also a thorough researcher and is both careful and efficient, a combination I have found to be rare in new lawyers. Perhaps his greatest strength comes in his ability to distill and communicate sophisticated legal ideas in a clear and simple way, whether orally or in written work. His easy style of communication showcases both his mental agility and creativity and has been extremely valuable to the current 1L students he teaches.

Finally, Ben's academic credentials do not overshadow his professionalism and collegiality. Despite being among the strongest students in the class, Ben's demeanor always helped others feel welcome to express their ideas. He routinely used his teaching background to take a comment that had missed the mark and link it to the correct answer, so that he was able to convey the more sophisticated connection without undermining the initial speaker. As a result he is well-liked by his peers and was a pleasure to have in class.

I have no hesitation in recommending Ben as a clerkship candidate. Should you have any questions, I would be happy to speak with you about his accomplishments. You can reach me at 812-989-3337.

Sincerely,

Jennifer Wimsatt Pusateri

Jennifer Wimsatt Pusateri - jpusateri@law.gwu.edu

BEN CARROLL

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Writing Sample

The attached writing sample is a bench memo that I wrote for my Judicial Lawyering class. The memo assesses a prisoner's motion to reconsider an order denying release. It analyzes tolling orders issued by the District of Columbia Superior Court during the pandemic and determines they should be upheld against a variety of constitutional and statutory challenges. This writing sample represents my own work and has not been edited by others.

To: Judge Canan
From: Ben Carroll, judicial intern
Date: October 28, 2020
Re: *United States of America v. Christen Wingfield*, Case No. 2020 CF2 004238

Issues

- 1) Do the Tolling Orders violate constitutional separation of powers?
- 2) Do the Tolling Orders violate the nondelegation doctrine?
- 3) Are the Tolling Orders issued from an unconstitutionally vague statute?
- 4) Do the Tolling Orders violate due process?
- 5) Do the Tolling Orders fail to meet statutory requirements?

Brief Answers

- 1) No. Constitutional separation of powers does not apply because Congress has total authority over the D.C. government structure and modified it to allow the Tolling Orders.
- 2) No. The nondelegation doctrine does not apply where Congress delegates authority to the D.C. government as it did here.
- 3) No. A statute may be attacked as unconstitutionally vague if it defines crimes or criminal sentences, and the Chief Judge issued the Tolling Orders from a statute that does neither.
- 4) No. The Tolling Orders represent a reasoned adjustment of the justice system to the pandemic.
- 5) No. No evidence supports that the Tolling Orders fail to meet statutory requirements.

Factual and Procedural History

On April 22, 2020, Metropolitan Police Department officers stopped a car in which Wingfield was a passenger. Gov't Opp'n at 1. At the time of the stop, Wingfield allegedly had a gun in his possession. *Id.* The next day, Wingfield underwent presentment in Superior Court and the Government charged him with one count of Unlawful Possession of a Firearm (Prior

Conviction) and one count of Possession of a Large Capacity Ammunition Feeding Device. *Id.* The Court found probable cause for both charges at presentment and ordered pre-trial detention. *Id.* at 2.

Prior to Wingfield's arrest, the Chief Judge of the Superior Court issued several Tolling Orders. Mot. to Reconsider, Exh. 1 ("Tolling Orders"). These Tolling Orders extended the deadline for many court proceedings, including evidentiary hearings on probable cause that otherwise would have had to occur within three days of presentment. *Id.* As a result, Wingfield did not receive that formal evidentiary hearing or the protection of several other procedures as otherwise required after presentment. Mot. to Reconsider at 14.

On May 6, Wingfield filed an Emergency Motion for Bond Review and Release from Custody to Home Confinement Due to Immediate Threat Posed by Pandemic. Order Denying Release. The next day, the acting emergency hearing judge denied the motion via written order. *Id.* That order found Wingfield had not presented a statutory basis for relief because he had not persuasively challenged the legal finding that the Government had shown "no condition or combination of conditions will reasonably assure the appearance of [Defendant] as required and the safety of any other person and the community" if the Court released Wingfield. *Id.* at 1. That order also found Wingfield had not presented a constitutional basis for relief because his emergency motion used the inappropriate vehicle of a habeas corpus motion. *Id.* at 2–9.

A week later, Wingfield filed a motion seeking reconsideration of that order and the Government filed an opposition. Mot. to Reconsider; Gov't Opp'n. The arguments on the constitutionality and legitimacy of the Tolling Orders within Section I.C of Wingfield's motion for reconsideration are currently before the Court.

Analysis

I. Separation of Powers

Wingfield argues that the statutes authorizing the Tolling Orders violate separation of powers because they vest in the Chief Judge an impermissibly legislative power to define and prescribe punitive matters. Mot. to Reconsider at 15–18. Wingfield contends that D.C. Code § 11-923 (the “Jurisdictional Statute”) and separation of powers limit the Superior Court’s jurisdiction and power to deciding individual criminal cases and controversies, and any statute that gives legislative power to the judiciary violates constitutional separation of powers. *Id.*; D.C. Code § 11-923 (2020). However, D.C. Code § 11-947 (the “Emergency Statute”) vests emergency powers in the Chief Judge, including tolling of various court deadlines, and the Chief Judge used those powers to issue the Tolling Orders. D.C. Code § 11-947 (2020); Tolling Orders. Wingfield argues the Emergency Statute violates separation of powers because it exceeds the court’s limited criminal jurisdiction by modifying the rights of all litigants and gives the judiciary an essentially legislative power to define and prescribe punitive matters. Mot. to Reconsider at 16–18. Finally, Wingfield contends in each argument for relief that if the Emergency Statute is unconstitutional or void, the Tolling Orders are too and the Court must release him because he never received required post-presentment hearings. *Id.* at 15–20.

The Government argues that separation of powers does not apply because Congress enacted both the Jurisdictional Statute and Emergency Statute, thereby altering the traditional powers of the Superior Court. Gov’t Opp’n at 7. The Government also maintains that even if separation of powers applied, the emergency tolling statute would “pass constitutional muster” because courts have inherent tolling authority. *Id.* The Government further contends that, to the extent the statutes conflict, the Emergency Statute would control as the more recent and specific

statute. *Id.* at 8. These arguments raise two issues: first, whether the Emergency Statute violates constitutional separation of powers, and second, whether the Emergency Statute and Jurisdictional Statute conflict.

First, the Emergency Statute does not violate separation of powers because this doctrine does not apply to it. Congress has plenary authority over D.C. granted by the Constitution. *Palmore v. United States*, 411 U.S. 389, 397 (1973); U.S. Const. art. I, § 8, cl. 17. Using that authority, Congress enacted statutes to create the D.C. government as “the familiar tripartite,” intending separation of powers between the Mayor (executive), D.C. Council (legislative), and D.C. Superior Court (judiciary) to reflect federal separation of powers. *Wilson v. Kelly*, 615 A.2d 229, 231 (D.C. 1992). To that aim, Congress also enacted the Jurisdictional Statute, which gives jurisdiction over criminal cases to the Superior Court. D.C. Code § 11-923 (enacted by Congress in 1970).

However, pursuant to that plenary authority, Congress may enact a statute that changes the traditional separation of powers in the D.C. government because limitations that control Congress’ power at a national level do not restrict its legislation affecting D.C. *Wilson*, 615 A.2d at 231–32. Thus, Congress may enact a statute to grant the judicial branch of the D.C. government power that would violate separation of powers in the federal system. *See id.* (noting that Congress amended D.C. Code to give to D.C. Council legislative veto over Mayor, giving Council power which would violate separation of powers in federal system); *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (voiding Congressional legislative veto over executive action as unconstitutional violation of separation of powers).

Here, Congress used this plenary authority over D.C. to enact the Emergency Statute and grant the Superior Court emergency powers. *Wilson*, 615 A.2d at 231–32; D.C. Code § 11-947

(enacted by Congress in 2012). Congress set up the D.C. government to reflect the federal government in form, function, and separation of powers. *Wilson*, 615 A.2d at 231–32. However, Congress has the plenary authority to alter that separation of powers in the D.C. government as it sees fit, and it did so in enacting the Emergency Statute. *Id.* Therefore, because Congress passed the Emergency Statute to alter the separation of powers in the D.C. government by granting the Superior Court power to issue the Tolling Orders, separation of powers challenges do not apply to the Emergency Statute. *Id.*

Moreover, even if separation of powers applied to the Emergency Statute, the Tolling Orders still might survive the challenge as within the Superior Court’s inherent power. Federal courts have inherent common-law authority to toll some deadlines without violating separation of powers. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 11 (2014). Although the Superior Court is not a federal court, Congress created the Superior Court as the D.C. government counterpart to the federal judiciary, and some of the Superior Court’s powers reflect those of the federal judiciary. *Wilson*, 615 A.2d at 231. The Tolling Orders reflect an authority similar to the federal courts’ inherent authority to toll some deadlines and might withstand a separation of powers challenge accordingly. *Compare Lozano*, 572 U.S. at 11 (2014) (explaining federal courts have authority to equitably toll statutes of limitations) *with* Tolling Orders (tolling statutory deadlines in emergency).

Second, the Emergency Statute and Jurisdictional Statute do not conflict, and even if they did the Emergency Statute would govern. If two statutes do not conflict, both will be given effect; however, if one statute permits or mandates what another statute forbids, courts must determine which statute governs. *Bridgforth v. Gateway Georgetown Condominium, Inc.*, 214 A.3d 971, 975 (D.C. 2019). To determine which statute governs, courts consider the whole

statutory scheme as well as the principles that the specific governs the general and that the later governs the earlier. *Id.* at 975–76.

The Jurisdictional Statute, delineating normal criminal jurisdiction, and Emergency Statute, permitting emergency powers that do not affect jurisdiction, do not conflict because neither statute permits nor mandates what the other forbids. *See id.* However, if and to the extent that they do, the Emergency Statute should govern as the more specific and recent statute in light of the whole statutory scheme. *Id.* Although the Jurisdictional Statute grants the Superior Court jurisdiction over criminal cases, it fits into a larger statutory scheme of jurisdictional grants to the Superior Court. *See* D.C. Code §§ 11-101–1323 (2020). After enacting statutes to create the Superior Court and grant it criminal and civil jurisdiction, Congress then enacted the Emergency Statute to give the Superior Court statutory authority to toll court deadlines. S. Rep. No. 112-178, at 3–4 (2012). Therefore, even if the Jurisdictional Statute and Emergency Statute conflict, the Emergency Statute governs as the more specific and recent statute in light of the whole statutory scheme.

II. Nondelegation Doctrine

Wingfield next contends that the Emergency Statute violates the nondelegation doctrine because it vests an inherently legislative power in the Chief Judge. Mot. to Reconsider at 17. Wingfield argues that the nondelegation doctrine prohibits the legislative branch of government from transferring its power to another branch. *Id.* Wingfield contends that the Emergency Statute transfers legislative power to the Superior Court and challenges it as an unconstitutional violation of the nondelegation doctrine. *Id.*

The Government argues, similar to its arguments in Part I, that the nondelegation doctrine does not apply to the Emergency Statute. Gov’t Opp’n at 7–9. The Government further argues

that the Superior Court's Tolling Orders would "pass constitutional muster" even if the nondelegation doctrine applied. *Id.* at 8–9.

The nondelegation doctrine prevents Congress from delegating its legislative or rulemaking authority to another branch of the federal government without an "intelligible principle" to guide them. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The intelligible principle must "clearly delineate [] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *See Unum Life Ins. Co. of Am. v. Dist. of Columbia*, 2020 WL 5666899, at *7–8 (D.C. Sept. 24, 2020). However, an intelligible principle may be quite broad, and the Supreme Court has only invalidated two statutes for lacking an intelligible principle. *See Whitman*, 531 U.S. at 474–75 (collecting cases).

Here, the nondelegation doctrine does not apply to the Emergency Statute. The nondelegation doctrine does not apply because it only covers statutes in which Congress imparts legislative authority to another branch of the federal government; here, Congress imparted authority to the judicial branch of the D.C. government via the Emergency Statute. *Whitman*, 531 U.S. at 472; D.C. Code § 11-947. As noted above, Congress may impart this authority to the Superior Court because it has plenary authority over D.C. and may legislate for it in ways that otherwise may exceed its national power. *Wilson*, 615 A.2d at 231–32. However, even if the nondelegation doctrine did apply to the Emergency Statute, it sets out the general policy of providing emergency tolling authority, specifies that the Superior Court may use this power, and limits it to certain defined emergencies. D.C. Code § 11-947. If the low bar of the nondelegation doctrine applied, the Emergency Statute would clear it. *See Whitman*, 531 U.S. at 474–75.

III. Vagueness

Wingfield further challenges the Emergency Statute as unconstitutionally vague. Mot. to Reconsider at 19. Wingfield contends that it sets no outer limits on detentions that could result from the Tolling Orders. Mot. to Reconsider at 19.

The Government contends that vagueness challenges do not apply to the Emergency Statute as only “laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses” may be challenged as vague. Gov’t Opp’n at 10–11 (quoting *Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (emphasis in original)).

Vagueness challenges do not apply to the Emergency Statute. Vagueness challenges invalidate vague “laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses.” *Beckles*, 137 S. Ct. at 892 (emphasis in original). As the Government explained, the Emergency Statute gives the Chief Judge fixed authority to toll court deadlines in certain defined situations, and the Tolling Order as applied here tolls evidentiary proceedings for pretrial detainments. D.C. Code § 11-947; Tolling Orders. The Emergency Statute and the Tolling Orders neither define a criminal offense nor fix possible post-conviction sentences for a criminal offense and therefore may not be challenged as unconstitutionally vague, even though they enable Wingfield’s pre-trial detention. D.C. Code § 11-947; Tolling Orders.

IV. Due Process

Wingfield also argues that the Tolling Orders deprived him of his Due Process right to hearings.¹ Mot. to Reconsider at 18 n.21. In a footnote, he contends that the Tolling Orders are unreasonable, arbitrary, and capricious because they suspend procedural protections, do not have

¹ Wingfield also seeks release on “Due Process (Eighth Amendment-type) and under habeas corpus.” Mot. to Reconsider at 20–21. As discussed, because the original Order Denying Release dealt with those arguments, neither Eighth Amendment due process nor habeas corpus will be briefed here.

meaningful limitations on the power to extend deadlines, and exceed the Superior Court's criminal jurisdiction. *Id.* (citing *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 85 (1980)).

The Government defends the Tolling Orders as a well-reasoned adjustment of court operations to the pandemic. Gov't Opp'n at 10. The Government further argues that the Defendant does not have a due process right to the hearing delayed by the Tolling Order because the Court already found probable cause at presentment, and that finding does not require adversarial safeguards. *Id.* (citing *Gerstein v. Pugh*, 420 U.S. 103, 119–26 (1975)).

Due process protects private rights by “demand[ing] only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained.” *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *see also PruneYard*, 447 U.S. at 85 (holding state constitutional provisions to encourage free speech at expense of private property rights did not violate due process because provisions had substantial relation to objective to be attained). Many due process violations of private rights for legitimate government purposes have been upheld. *Nebbia*, 291 U.S. at 525–35 (collecting cases).

Wingfield relies on *PruneYard Shopping Center*, which deals with due process as it relates to private property rights and not as it relates to defendants' rights in criminal procedure. *PruneYard*, 447 U.S. at 85. However, to the extent that analysis applies, Wingfield's arguments mostly reflect his earlier rejected arguments. Further, although the Tolling Orders may prevent Wingfield from receiving certain hearings, they represent a reasoned adjustment of court operations with a substantial relation to the objective of managing the court during an emergency. *See id.* at 85. Also, as the Government points out, pre-trial detention requires a finding of probable cause by the court but does not require adversarial safeguards; although

Wingfield did not have an adversarial evidentiary hearing, the Court still found probable cause based on the evidence that the Government brought. Gov't Opp'n at 10 (citing *Gerstein*, 420 U.S. at 119–26). Therefore, the Tolling Orders did not violate his due process rights as they are not unreasonable, arbitrary, or capricious and instead reflect a reasoned adjustment of court operations to the pandemic.

V. Failure to Meet Statutory Requirements

Wingfield further contends that the Tolling Orders do not satisfy two Emergency Statute requirements. Mot. to Reconsider at 19. Wingfield first argues that no public information indicates that the Chief Judge sent the Orders to certain Congressional recipients. *Id.* Wingfield second argues that the Chief Judge did not properly consider the ability of the Government to operate the justice system. *Id.* Wingfield does not cite any authority to support either argument.

On the first requirement, the Government argues that the Emergency Statute does not require public notice of the Chief Judge sending the Orders to the proper Congressional recipients and that the Defendant lacks standing to challenge the alleged forwarding failure. Gov't Opp'n at 11–12 (citing *Nat'l Mall Tours of Wash., Inc. v. U.S. Dep't of Interior*, 862 F.3d 35, 45 (D.C. Cir. 2017)). Further, the Government argues that the Chief Judge did satisfy the second requirement by considering the government's ability to operate the justice system. Gov't Opp'n at 11–12.

Here, regarding the first requirement that the Orders must be sent to certain recipients, while it may be true that no public information supports that the Chief Judge forwarded the Orders to the proper Congressional recipients, that does not matter. The Emergency Statute requires forwarding the Orders to certain recipients; it does not require the Chief Judge to publicize that forwarding. D.C. Code § 11-947(e)(2). No evidence speaks to whether the Chief

Judge satisfied this forwarding requirement or not, and in the absence of any evidence, Wingfield has not carried his burden of persuasion. The Government also relies on *Nat'l Mall Tours* to argue that Wingfield does not have standing to challenge the supposed forwarding failure, but that case deals with failure to follow agency procedures and so is not directly analogous to an alleged failure of the Chief Judge to follow statutory requirements. *Nat'l Mall Tours*, 862 F.3d at 45. *Nat'l Mall Tours* and the Government's challenge to Wingfield's standing may not be applicable, but the Court may still deny Wingfield's argument either as not carrying its burden of persuasion or not supported by law. *See, e.g., In re Orshansky*, 952 A.2d 199, 211 n.15 (denying argument as "completely unsupported" by law). Alternatively, the Court may order more briefing on the matter to determine if Wingfield's contentions have any factual or legal support.

Regarding the second requirement that the Chief Judge consider the ability of the Government to operate the justice system, the Chief Judge indicated that the court satisfied the Emergency Statute's requirement to consider the impact of the Tolling Orders on the justice system. Tolling Orders at 3 n.1. Plaintiff's argument suggests the Court should second-guess the Chief Judge's consideration as not "proper" because subsequent Tolling Orders have modified or rolled back certain operation restrictions found in the first Tolling Order, such as who may be in-person at the courthouse. Absent more, this argument should be rejected as it offers no principled reason to set aside a considered determination of the Chief Judge which satisfies the requirements of the Emergency Statute.

Recommendation

Constitutional challenges on separation of powers, the nondelegation doctrine, and vagueness do not apply and Defendants' arguments on those grounds should be rejected. Due process challenges do not have merit because the Tolling Orders represent a considered and

reasonable adjustment of the Superior Court to the pandemic. Finally, the Court may reject Wingfield's arguments on the Tolling Orders failing to meet statutory requirements as either not meeting its burden of persuasion or having no support in law, or, alternatively, the Court may order more briefing on legal and factual authorities to support either side's arguments on that subject.

Applicant Details

First Name **Scott**
 Middle Initial **T**
 Last Name **Christopher**
 Citizenship Status **U. S. Citizen**
 Email Address scottchristo@gmail.com

Address

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--

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Applicant Education

BA/BS From **University of Pittsburgh**
 Date of BA/BS **April 2012**
 JD/LLB From **Benjamin N. Cardozo School of Law, Yeshiva University**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=23314&yr=2010
 Date of JD/LLB **May 28, 2019**
 Class Rank **10%**
 Law Review/Journal **Yes**
 Journal(s) **Cardozo Law Review**
 Moot Court Experience **No**

Bar Admission

Admission(s) **District of Columbia, New York**

Prior Judicial Experience

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Scott T. Christopher

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April 10, 2022

The Honorable Lewis J. Liman
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007

Dear Judge Liman,

I am a third-year associate in the antitrust group at Weil, Gotshal & Manges LLP. I am writing to apply for a 2024–2025 term clerkship in your chambers.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. The writing sample, which has been edited to remove the client’s identity, is a response to a request for information issued by the Directorate General for Competition of the European Commission. I substantially drafted this writing sample which reflects edits from supervising partners prior to submission to the European Commission. Also enclosed are letters of recommendation from Weil partners Eric S. Hochstadt (212-310-8538), Luna N. Barrington (212-310-8421), and John E. Scribner (202-682-7096).

If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Scott T. Christopher

Scott T. Christopher

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WORK EXPERIENCE

Sept. 2019 – Present	Weil, Gotshal & Manges LLP New York, NY Antitrust associate Summer associate (2018) Practice focused on cartel antitrust, civil antitrust, class action, and other complex litigation, as well as transactional regulatory clearance and antitrust counseling. Lead teams involved in non-public FTC/DOJ investigations. Analyze proposed transactions and provide risk analysis. Prepare for and defend depositions in civil litigation. Research various antitrust issues. Draft and edit sections of dispositive motion. Interview fact witnesses. Manage discovery and document review. Liaise with third-parties regarding case development. Maintain an active pro bono practice.
Jan. 2018 – May 2018	Honorable Colleen McMahon, S.D.N.Y. New York, NY Student law clerk Researched legal issues and prepared drafts of judicial opinions on various motions. Assisted law clerks with docket management.
Aug. 2017 – Dec. 2017	United States Attorney's Office, S.D.N.Y. New York, NY Legal intern Accompanied AUSAs in court appearances. Attended proffer sessions. Researched legal issues and prepared memoranda for AUSAs.
June 2017 – Aug. 2017	New York County District Attorney's Office New York, NY Legal intern
May 2013 – May 2016	Schulte, Roth & Zabel LLP New York, NY Paralegal
June 2012 – May 2013	Jaffe & Asher LLP New York, NY Paralegal

EDUCATION

2019	Benjamin N. Cardozo School of Law New York, NY Juris Doctor, <i>magna cum laude</i> Order of the Coif <i>Cardozo Law Review</i> , Associate Editor
2012	University of Pittsburgh Pittsburgh, PA Bachelor of Arts, Political Science

ADMISSIONS


New York; District of Columbia; S.D.N.Y.

5/9/2021

Academic Transcript

800431369 Scott T. Christopher
May 09, 2021 08:53 pm

Academic Transcript

 This is not an official transcript. Courses which are in progress may also be included on this transcript.

Institution Credit

Transcript Data**STUDENT INFORMATION**

Birth Date: 04-OCT
Student Type: Continuing

Curriculum Information**Current Program**

This is NOT an Official Transcript

DEGREE AWARDED

Awarded: Juris Doctor **Degree Date:** May 28, 2019
Institutional Honors: Magna Cum Laude

Curriculum Information**Associated Program Information**

Program: Juris Doctor
College: Cardozo School of Law
Major: Law

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Institution:	84.000	84.000	84.000	63.000	233.339	3.703

INSTITUTION CREDIT -Top-

Term: Summer 2016

College: Cardozo School of Law
Major: Law
Student Type: New First Time

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points
LAW	6003	PR	Contracts	B	5.000	15.000
LAW	6101	PR	Criminal Law	A	3.000	12.000
LAW	6202	PR	Elements of the Law	A-	2.000	7.334

Term Totals (First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	10.000	10.000	10.000	10.000	34.334	3.433
Cumulative:	10.000	10.000	10.000	10.000	34.334	3.433

Unofficial Transcript

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